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BEFORE THE SURFACE TRANSPORTATION BOARD

PENNSYLVANIA RAILROAD COMPANY	)	
	)	
--MERGER--	)	Finance Docket No. 21989 (Sub.-No. 4)
	)	(Arbitration Review)
NEW YORK CENTRAL RAILROAD COMPANY)		

PENN CENTRAL TRANSPORTATION COMPANY'S SUR-REPLY IN RESPONSE TO CLAIMANTS' BRIEF IN OPPOSITION TO PETITION FOR REVIEW OF ARBITRATION AWARD

As demonstrated in Penn Central's Petition -- the record below, the law and justice all compel the Board to vacate the Split Panel's irrational decision and to enter judgment for Penn Central. Nothing in the Claimants' opposition comes remotely close to changing this result.

Claimants' opposition is a hodgepodge of contradictory and inconsistent arguments. Many of these arguments – like the arguments concerning false distinctions between subsections 1(a) and 1(b) of the MPA and their tortured interpretation of Appendix E – were never presented prior to the arbitration or in the 40-year history of this dispute. They were simply fabricated – post hearing – to avoid the only rational decision that could be rendered given the Claimants utter failure to produce any evidence on the two major issues in the case.

The two major issues were framed long ago by District Court Judge Lambros when he referred this dispute to arbitration:

1) "[W]ere Plaintiffs placed in a worse condition with respect to their employment by reason of the merger"[1] and

2) "[T]he Plaintiffs now must come forward with evidence to support the position that there was compensation loss to which they are entitled to payment."[2]

[1] 1976 Judge Lambros Oral Ruling, Appendix Vol. 2 at Appendix-0694.
[2] *Id.* Appendix Vol. 2 at Appendix-0710.

The record is clear and unambiguous—Claimants proved neither eligibility (that is, that the merger caused their job loss) nor compensation loss as explicitly required under the MPA. The Split Panel's decision, therefore, must be vacated and judgment entered for Penn Central. This sur-reply succinctly explains why each of the Claimants' arguments are without merit and why judgment must be entered for Penn Central.

I. Claimants' Argument that the MPA does not Contain a Causation Requirement is Ludicrous and Totally Without Merit for at Least 10 Separate Reasons.

Claimants argue – repeating the irrational arguments of the Split Panel – that the MPA does not contain a causation requirement. They string together three inchoate propositions to support this argument, all of which are contradicted by the clear, unambiguous and express language of the MPA itself. Claimants' propositions are also contradicted by the rulings of Judge Lambros, the Sixth Circuit, and the STB. Claimants' three propositions are:

1. "[A] causation requirement only exists in the original WJPA";[3]

2. "[T]his provision [that in order to be eligible for benefits, Claimants had to prove that the merger caused job loss] was deliberately modified in subsection 1(a) and was completely eliminated in subsection 1(b)"[4] of the MPA; and

3. "The MPA established . . . for the employees of the two railroads . . . a lifetime job guarantee."[5]

This mimics what the Split Panel said: "we are not willing to treat either the title or the prefatory clauses as trumping the operative language of §1(b) of the MPA."[6]

The Split Panel and Claimants are flat-out wrong for at least ten separate reasons.

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[3] Claimants' Brief in Opposition, pg. 40.
[4] Claimants' Brief in Opposition, pg. 40.
[5] Claimants' Brief in Opposition, pg. 1.
[6] Arbitration Award, pg. 64. (Appendix Vol. 5 at Appendix-2686).

1. The Claimants' "no causation" arguments and the propositions that support them – such as the false distinction between Subsections 1(a) and 1(b) of the MPA – were completely fabricated and strung together after the Arbitration Hearing. Claimants invented these arguments after the hearing to cover up a fatal flaw in their evidence and case—they produced no evidence from any witness (fact or expert) that they meet the basic threshold for eligibility for benefits under the MPA. That threshold is that they suffered job loss by reason of the merger, or, in other words, that the merger caused their job loss. The record evidence clearly shows that the merger did not cause their job loss. Railroad expert, Michael Weinman, testified for over two hours at the arbitration, providing compelling statistics and facts on the impact that the decline in passenger service had on the Claimants' jobs at the CUT and how "the merger had almost no effect on the CUT."[7] All of this evidence went unrebutted, and the Claimants' cannot now salvage their case with post hoc arguments seeking to cover up their evidentiary failure.

2. The MPA clearly and expressly says that there is a causation requirement and that the benefits under the MPA are for employees who were adversely affected by the merger, and explicitly states:

a) In the title of the MPA itself, ***Agreement for Protection in Event of Merger of Pennsylvania and New York Central Railroads***, i.e., job protection in the event of a merger;

b) The first Whereas Clause identifies the merger between the two railroads as the subject of the agreement;

c) The third Whereas Clause states that the merger "**will or may have adverse effect upon employees represented by labor organizations**";

d) The fifth Whereas Clause quotes §5(2)(f) of the ICC which states that the ICC will require job protection for "**railroad employees affected by such order [the merger]**";

[7] Appendix Vol. 5 at Appendix-3020 (p. 537, ln. 17 – p. 539, ln. 13).

e) The sixth Whereas Clause states that the parties "have reached agreement respecting the protection to be afforded employees of the railway carriers **involved or who may become involved in the aforesaid application and transactions**" of the merger; and

f) Subsection 1(a) of the MPA continues to emphasize that the WJPA "shall be applied for the protection of all employees of Pennsylvania and Central . . . who may be adversely affected . . . **incident to approval and effectuation of said merger.**"

Indeed, these clauses reiterate the unifying concept of the MPA, which is protection from proven loss sustained as a result of the merger.

3. Judge Lambros clearly and unequivocally held that there is a causation requirement and that the Claimants must prove that they are entitled to compensation. Judge Lambros, who originally presided over these cases and eventually sent them to arbitration in 1976, issued two rulings—which are binding on the parties—that clearly recognized and established a causation requirement. Specifically, Judge Lambros framed the Claimants' burden of proof for entitlement to benefits under the MPA in the following manner:

a) "[W]ere Plaintiffs placed in a worse condition with respect to their employment by reason of the merger;"[8] and

b) "[T]he Plaintiffs now must come forward with evidence to support the position that there was compensation loss to which they are entitled to payment."[9]

No matter how the Claimants spin it in their Brief, the MPA has and always was meant to have a causation requirement. The MPA was to provide benefits to employees only if they were adversely affected by the merger.

4. The Sixth Circuit has clearly said there is a causation requirement. In addressing the causation issue, the Sixth Circuit in *Augustus* reaffirmed the prior rulings of Judge Lambros and stated that the MPA was "for the protection of employees affected by the proposed

[8] 1976 Judge Lambros Oral Ruling, Appendix Vol. 2 at Appendix-0694.
[9] *Id.* Appendix Vol. 2 at Appendix-0710.

merger."[10] In addition, and later in their opinion when discussing the regulatory framework of the merger, the Sixth Circuit states that: "**As a condition for approval** [of the merger] . . . the Board is required to protect the interests of **affected** railroad employees. Specifically, the Board is required to impose conditions on any merger transaction such that employees are **not placed in a worse position with respect to their employment** for at least four years following the merger."[11] As with Judge Lambros' holdings, the Sixth Circuit's holding in *Augustus* is binding on the Claimants and is dispositive of the issue of whether or not the MPA contains a causation requirement.

5. The Board has clearly said there is a causation requirement. In the Board's 1998 decision in the *Knapik* case in Pennsylvania Railroad Co. – Merger – NY Central Railroad Company (Arbitration Review) STB Finance Docket No. 21989 (Sub-No. 3) (served December 8, 1998), the Board clearly states that it is reviewing an appeal of the denial of benefits "under an agreement entered into on January 1, 1964, **for the protection of railroad employees who would be affected by the 1968 merger** of the Pennsylvania Railroad Company and the New York Central Railroad Company to form the Penn Central Transportation Company."[12] Thus, consistent with the terms of the MPA and the rulings of Judge Lambros and the Sixth Circuit, the Board has recognized the existence of the causation requirement in the MPA.

6. Prior to their post-hearing briefs, Claimants themselves recognized that there was a causation requirement. The Claimants' argument that causation has been removed from the MPA is disproved by their own Complaints filed to initiate these cases, their opposition to Penn

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[10] *Augustus v. Surface Transportation Board*, 2000 U.S. App. LEXIS 33966, at *2 (6th Cir. 2000)("*Augustus*") (Appendix Vol. 1 at Appendix-0409-10).
[11] *Augustus* at *8. (Appendix Vol. 1 at Appendix-0410).
[12] Appendix Vol. 2 at Appendix-0742. (emphasis added).

Central's Motion for Summary Judgment, their own representations at the arbitration, and even in their post-hearing brief.

In their Complaints, Claimants specifically sought recovery under Appendix A of the MPA [the WJPA]—which as they concede in their Brief, contains a requirement of causation.[13] In their Complaint, the *Sophner* Claimants unambiguously stated: "[t]he Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to 'any employee of any of the carriers participating in a particular coordination who is deprived of employment **as a result of said coordination** . . .'."[14] The *Knapik* Claimants also cite to the WJPA, pleading that Penn Central must compensate "any employee of any of the carriers participating in a particular coordination who is deprived of employment **as a result of said coordination.**"[15] The *Watjen* Claimants, in their Complaint, in the section entitled "Basis for Complaint" argue that their claim arises because "[t]he agreement purports to give protection to employees in accordance with Section 5(2)(f) of the Act which provides that **the effect of a merger** as approved by the Commission 'will not result in employees . . . of the railroad **affected by such** should be **in a worse position with respect to their employment** . . .'."[16]

Similarly, in opposing Penn Central's Motion for Summary Judgment, the Claimants conceded the very point they have so vehemently denied, that the MPA's purpose was to protect employees from adverse consequences resulting from the merger. Indeed, the Claimants stated: "The Claimants' furloughs **were the result of the coordination of the railroads** which was anticipated **and was the reason the MPA was enacted.**"[17] Claimants' counsel also emphasized

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[13] Claimants' Brief in Opposition, pg. 6.
[14] Appendix Vol. 5 at Appendix-3493. (emphasis added).
[15] Appendix Vol. 5 at Appendix-3489. (emphasis added).
[16] Appendix Vol. 5 at Appendix-3500. (emphasis added).
[17] Claimants' Opposition to Penn Central's Motion for Summary Judgment, pg. 22. (emphasis added). (Pursuant to Penn Central's Motion to Supplement the Record, a copy of the foregoing is attached hereto at Tab 1)

this unifying concept of causation contained in the MPA at the arbitration in her opening statement: "The **purpose of the merger** was to create a more efficient and a unitary system of transportation. The unions to which Claimants belonged knew that **such efficiencies would create job loss**. It was, in fact, inevitable."[18] And finally, in their post-arbitration brief, Claimants again admit that their losses had to be caused by the merger in order to recover under the MPA, and state that "**[a]s a result of the coordination**, the Watjen/Bundy Claimants had no seniority."

The Claimants' pleadings and their counsel's own admissions expose the complete lack of merit behind their arguments on causation. Thus, as they admit themselves, the Claimants have always known that in order to recover under the MPA, they must first prove that their loss was caused as a result of the merger.

7. At pages 6, 7 and 40 of their Opposition Brief, Claimants make the argument noted above at page 2: "[T]his provision [the causation provision—that in order to be eligible for benefits, Claimants had to prove that the merger caused their job loss] was deliberately modified in subsection 1(a) and was completely eliminated in subsection 1(b)" of the MPA. This argument is clearly wrong and must be rejected because it turns the clear language of the MPA, basic rules of contract construction, rules of grammar and plain old common sense all on their heads.

As noted above at page 3, the title of the MPA and numerous portions of the prefatory clauses clearly say that the MPA extended job protection to railroad employees affected by the merger. This is why it is called a "merger protection" agreement.

Even though the MPA specifically says it is for protection from adverse job losses caused by the merger, Claimants argue that this provision was deliberately modified. It was modified in

[18] Arbitration Transcript, pgs. 9-10. (Appendix Vo. 5 at Appendix-2840).

the following way, according to the Claimants: "The MPA eliminated the language 'as a result of such coordination' and replaced it with the phrase 'incident to approval and effectuation of said merger.'"[19] In other words, according to the Claimants, requiring job loss to be "as a result of such coordination" and requiring job loss to be "incident to approval and effectuation of said merger" are phrases that have two different meanings. "As a result of such coordination," according to the Claimants, has some meaning different from "incident to approval and effectuation of said merger."

This argument is so nonsensical it is frivolous. The two phrases mean exactly the same thing. They are two ways of expressing the same overarching purpose of the merger protection agreement—to protect against job loss that is "as a result of" or is "incident to" the coordination or merger. Indeed, The American Heritage Dictionary of the English Language defines "incident" explicitly by using the words "as a result of." Specifically, as set forth in the Dictionary, "incident to" and "as a result of" mean exactly the same thing:

> Incident. Tending to arise or occur as a result or an accompaniment: "*There is a professional melancholy . . . incident to the occupation of a tailor*" (Charles Lamb). Related to or dependent on another thing.[20]

Cleary, therefore, there is no modification of the causation requirement in subsection 1(a).

Nor is there any "elimination" of this causation requirement in subsection 1(b). If the Claimants and Split Panel were correct, subsection 1(b) would have clearly stated that this basic requirement was being eliminated. It does not. Quite clearly, there is absolutely no language in subsection 1(b) that says—either expressly or implicitly—that the causation or eligibility requirement was being eliminated. As a matter of law and contract construction, this language cannot be read into the MPA. *Turner v. Langenbrunner*, 2004 Ohio App. LEXIS 2489 at *13

[19] Claimants' Brief in Opposition, pg. 6.
[20] "Incident." *The American Heritage Dictionary of The English Language*. Third Edition. 1992. Print.

(holding that a court may not make contracts for others and "read into them terms or language not there"); *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St. 3d 50,53 (1988)(reiterating that the court's duty is to give effect to the words used by the parties, not "to insert words not used"); *Coach Lines v. Public Utilities Commission*, 20 Ohio St.2d 125, 127 (1969) (In construing a contract, "it is the duty of [a] court to give effect to the words used, not to delete words used or insert words not used.").

Grammatically, subsection 1(b) is merely a continuation of a subsection 1(a); Subsection 1(a) and 1(b) are separated by a semi-colon not a period. It is elementary English Grammar that:

> **7. Use a colon after an independent clause to introduce a list of particulars, an appositive, an amplification, or an illustrative quotation.**
>
> A colon tells the reader that what follows is closely related to the preceding clause.[21]

It is clear from the explicit language and grammatical structure of the MPA that subsection 1(a) and 1(b) are closely related. Grammatically, subsection 1(b) does not change in any way what is set forth in subsection 1(a), but instead incorporates and flows from what is established in subsection 1(a). In other words, 1(b) is a true "sub"-section of 1(a), not a separate, new or independent section. Nothing in subsection 1(b) in any way changes—let alone eliminates—the requirement in 1(a) that "this Agreement" is for all employees "who may be adversely affected with respect to their compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto incident to approval and effectuation of said merger...."

Contrary to Claimants' arguments, there is no such thing as a subsection 1(a) and subsection 1(b) claim. The MPA contains no language creating different claims and makes no

[21] William Strunk and E.B. White. *The Elements of Style*. Third Edition. (New York: Macmillan, 1979), 7.

such distinction. Again, as a matter of law, such language cannot be read into the MPA. *Turner*, 2004 Ohio App. LEXIS at *13; *Cleveland Elec. Illum. Co.*, 37 Ohio St. 3d at 53; *Coach Lines*, 20 Ohio St. 2d at 127. Subsection 1(b) merely provides a list of additional benefits employees are entitled to post merger, provided that those employees meet the requirement set forth in 1(a)—they are employees "who may be adversely affected with respect to their compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto incident to approval and effectuation of said merger."

Claimants' proposition that the MPA established "a lifetime job guarantee" for all employees is just plain ludicrous.[22] If the MPA had established such an incredible benefit, it would have said so. There is no language whatsoever that says employees have a "lifetime job guarantee." Once again, the benefit of a "lifetime job guarantee" cannot, as a matter of law, be read into the MPA. The Claimants blatantly overreach by twisting the words of the MPA, reading language into the agreement that is not there, and using extrinsic and completely irrelevant, hearsay evidence such as the *Headlight* publication,[23] all to re-write the MPA into a lifetime job guarantee. However, the parties called their agreement the "Merger Protection Agreement," not the "Lifetime Job Guarantee Agreement." The parties' agreement lies within the four corners of the MPA, and the Claimants' extraneous evidence and flawed interpretations do not change this fact. *Progressive Casualty Insurance Company v. Budget Rent A Car System, Inc.*, 2008 U.S. Dist. LEXIS 49476, at *11 (N.D. Ohio June 26, 2008)("Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence.").

[22] Claimants' Brief in Opposition, pg. 1.

[23] While this publication is pure hearsay, to the extent the Board chooses to consider it, the article undercuts the very position for which the Claimants cite it. The "question and answer" section directly above the section cited by the Claimants states: Q: What does the Employment Protection Agreement mean? A: It guarantees that present employees covered by this agreement will not be removed from the payroll **as a result of the merger** of the New York Central and Pennsylvania Railroad. (Claimants' Appendix at 1265-1). (emphasis added).

8. The proper relationship between the WJPA, MPA, subsection 1(a) and 1(b) is clear from the plain language of the agreements and totally eviscerates the Claimants and Split Panel's rationale. As Dean Emeritus Tomain pointed out in his Dissenting Opinion at pages 6-7 in discussing the relationship between the MPA and the WJPA, the WJPA:

> Claimants and the Majority argue that the coordination benefits provided in the WJPA were expanded in the subsequent 1964 Merger Protection Agreement. Claimants and the Majority are correct that benefits were extended. They are incorrect about the extent of those "extended" benefits which are set out in the clear and express language of the 1964 Agreement. Briefly, the WJPA offered two protections: (1) **some employees** were protected against job loss *due to a merger* (2) for a **period of 5 years**. The MPA extended those benefits and protected (1) **all employees** (2) **for an indeterminate period** against job loss *due to a merger*. Thus, employees under the MPA have significantly extended benefits if they can demonstrate that they have suffered job loss due to the merger as expressly provided for in the agreement.[24]
> (original emphasis)

9. The so-called "business decline clause" does not eliminate the causation requirement. The Claimants' argument – that because a "business decline clause" was negotiated is proof that there is no causation requirement – takes this clause completely out of context and sequence.[25] This clause, in subsection 1(b), deals with reductions in force, post-merger, and pertains to reducing workers already entitled to protection under the MPA, that is, workers whose jobs were lost or reduced by reason of the merger. Indeed, the clause states " . . . in the event of a decline in the **merged company's business** in excess of 5% of . . . net revenue ton miles . . . reduction in forces . . . may be made . . . below the number of employees **entitled to preservation of employment** under this Agreement."[26] In order to be "entitled to

[24] Arbitration Award, Dissenting Opinion, pg. 6. (Appendix Vol. 5 at Appendix-2809).
[25] Claimants' Brief in Opposition, pg. 41.
[26] See MPA, Section 1(b). Appendix Vol. 1 at Appendix-0460-61. (emphasis added).

preservation of employment under [the] Agreement," one obviously would have to be eligible or entitled to merger protection because he suffered job loss **by reason of the merger.**

Stated differently, the clause is applied in the following sequence: First, it had to be determined whether a worker's job was being eliminated or otherwise affected because of the merger or for some other reason like a decline in passenger service. Next, if it was determined that an employee was affected because of the merger, and not for some other reason, then that employee was taken into the employment of the merged company. And finally, only if the employee was brought into the employment of the merged company, did he or she receive the protection of the business decline clause. The Claimants' argument regarding this clause completely begs the question of whether or not their job loss was due to the merger or some other cause.

However, even if the "business decline clause" was somehow applicable to these Claimants, as expert Michael Weinman testified, that clause specifically addresses, and is confined to, systemwide **freight** business only.[27] But the Claimants here all worked at the CUT, a **passenger** station, not a freight yard—further demonstrating its irrelevance.

10. Claimants' "course of performance" argument does not eliminate the causation requirement. Claimants argue that what they call Penn Central's "standard forms" are relevant to their claims as evidence of how Penn Central administered MPA benefits. This argument is totally unavailing because these forms are unauthenticated and rank hearsay taken completely out of context. Claimants concede that these forms relate to rail yards and locations other than the CUT and to employees other than CUT employees. There is no evidence to tie these forms to the CUT, where the Claimants worked. There is no evidence whether there had been previous proceedings determining Mr. Middleton's, Mr. Predmore's, or Mr. Brehnen's eligibility for MPA

[27] Arbitration Transcript, pgs. 546 -550. Appendix Vol. 5 at Appendix-3022-23.

benefits. In short, there is no evidence that any of these individuals were similarly situated to any of the Claimants. Without such connecting evidence in the record, the isolated, unauthenticated "standard forms" make absolutely no sense and have no evidentiary value.

What really is happening with respect to these "standard forms" is that counsel takes them and, without any evidence in the record, literally testifies as to what they mean. These assertions are nothing but counsel's own conjecture, unsubstantiated by any evidence in the record. Black letter law provides that "arguments made by counsel cannot be considered as evidence, [when] no evidence to support counsel's statement was offered." *Gemini, Inc. v. Ohio Liquor Control Comm.*, 2007 Ohio 4518, ¶ 11 (Ohio App. 2007).

Furthermore, the fact that Penn Central paid $116 million in merger benefits clearly proves that Penn Central paid benefits when they were due and owing – that is, when a claimant suffered job loss as a result of the merger. Where, as here, Claimants suffered job loss for some other reason—like a dramatic decline in passenger traffic at a passenger terminal—no benefits were paid.

II. Claimants did not Come Forward with any Evidence of Eligibility for Benefits Under the MPA.

As discussed above, the Claimants spend most of their Brief arguing that there was no causation requirement in the MPA, that is, they did not have to prove job loss **by reason of the merger.** They desperately try to eliminate this requirement because they utterly failed to come forward with any evidence that they suffered job loss **by reason of the merger.** Not only did the Claimants fail to put on any evidence that the merger caused their job loss, they did not offer any evidence whatsoever to rebut Penn Central's expert, Michael Weinman, that the job loss was caused by a dramatic decline in passenger traffic.

What they did put on, however, was testimony from the Claimants themselves that their job loss was caused by a decline in passenger traffic into the passenger terminal at the CUT. Specifically, Claimant McNeeley testified:

Q: And did you work your entire career at the Cleveland Union Terminal?

A: No. Folded up in '67, the end of passenger trains.[28]

Claimant Gallagher testified:

Q: During your employment at the CUT, was there a decline in passenger service?

A: I would say yes.

* * *

Q: Okay. So the decline in passenger business resulted in less and less passenger cars coming through the CUT?

A: Yes.

Q: Was the decline in passenger cars that came through the CUT, did that lead to a lack of work for which one could bid off?

A: I don't know. I couldn't really say. Yeah.[29]

Claimants' witness Mr. Knapik, who worked at the CUT before the merger and continued with first Penn Central and then Conrail afterwards, testified:

Q: And you were aware that there was a furlough at that time?

A: Yes.

Q: Do you know what happened to the jobs? Why was there a furlough at that time, do you know?

A: There was a decrease in passenger service, I believe.[30]

[28] Appendix Vol. 1 at Appendix-0381. (p. 15, ln. 3-6).
[29] Appendix Vol. 1 at Appendix-0379. (p. 35, ln. 7 – p. 36, ln. 10).
[30] Appendix Vol. 5 at Appendix-2864-65. (p. 108, ln. 25 – p. 109, ln. 7).

No Claimant put forth any evidence to rebut this testimony from their own Co-Claimants that their job loss was caused—not by the merger—but by the decline in passenger service at the CUT. The only additional evidence on this point was the corroborating testimony of railroad expert witness Michael Weinman, which the Claimants also failed to rebut.[31]

III. There is no Evidence in the Record that Claimants are Entitled to Compensation Per the Calculation set forth in the MPA.

While the Claimants may allege that their expert "Dr. Rosen correctly calculated damages according to the terms of the MPA,"[32] Dr. Rosen's expert report and testimony provided at the arbitration speak for themselves and show he clearly did not. Section 6(c) of the WJPA sets forth the correct, and only, method – consisting of six straightforward steps – for calculating displacement allowances. Yet, Dr. Rosen admitted on cross-examination to not following five of the six steps.[33] He failed to follow Section 6(c) even though in his report, Dr. Rosen states that benefits are to be calculated in accordance with Section 6(c). Dr. Rosen's report specifically states: "[t]he displacement allowance provided that: 'if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference . . ..'"[34] This is a direct quote from Section 6(c) of the WJPA! Dr. Rosen failed to follow Section 6(c) even though at the arbitration he testified that Section 6(c) defines and provides the correct formula for calculating benefits under the MPA. Dr. Rosen testified:

> Q: And specifically, your report is – here you cited this language "if his compensation in his current position is less than any amount [*sic* month] in which

[31] Arbitration Transcript, pg. 536. (Appendix Vol. 5 at Appendix-3020).
[32] Claimants' Brief in Opposition, pg. 61.
[33] Appendix Vol. 5 at Appendix-2999. (p. 454, ln. 25 – p. 455, ln. 21); Appendix Vol. 5 at Appendix-3000 (p. 456, ln. 15 – p. 457, ln. 13 & p. 458, ln. 9-17 & p. 459, ln. 1-25); Appendix Vol. 5 at Appendix-3001 & 3004. (p. 460, ln. 1-8 and p. 475, ln. 14-22).
[34] Appendix Vol. 2 at Appendix-1261-62.

he performed work, then [*sic* than] the aforesaid average compensation, he shall be paid the difference."

A: Yes.

Q: All right. And that's generally what's known as the displacement allowance, correct?

A: That's my understanding, yes.

Q: Now, I think we all agree, and you agreed a little bit earlier, that Section 6(c) tells us how to calculate the displacement allowance; isn't that right?

A: Section 6(c) outlines a formula on page 10. That's correct.[35]

Dr. Rosen did not follow Section 6(c) of the WJPA, because doing so would have provided a drastically less desirable result for the Claimants. Instead, in an attempt to avoid the devastating and preclusive effect of Section 6(c), the Claimants invented an argument for the first time at the arbitration that the benefits they claim entitlement to are to be calculated under Appendix E of the MPA. However, the Claimants' and Dr. Rosen's improper reliance on Appendix E as a measure of damages is totally unavailing because Appendix E, by it's plain language, is limited to determining the Claimants' status, not the amount of their benefits. Appendix E states, in relevant part: **"For purposes of determining whether, or to what extent, such an employee has been placed in a worse position** with respect to his compensation, his total compensation and total time paid for during the base period will be separately divided by twelve."[36] Thus, as Dean Emeritus Tomain pointed out in his Dissenting Opinion, "Appendix E enables a decision maker to determine whether any given employee satisfies the requirement that he was 'placed in a worse position.'"[37] It does not provide a **method** for measuring compensation, it simply acts as a measure against the benefit calculations in Section 6(c) of the

[35] Arbitration Transcript, pg. 438. (Appendix Vol. 5 at Appendix-2995).
[36] *See* MPA, Appendix E. (Appendix Vol. 1 at Appendix-0471).
[37] Arbitration Award, Dissenting Opinion, pg. 20. (Appendix Vol. 5 at Appendix-2823).

WJPA to determine if an employee was placed in a "worse position with respect to his compensation." Indeed, Appendix E clearly states that the WJPA [Section 6(c)] was to be used to make the necessary benefits calculations, and states that "[e]mployees . . . entitled to benefits of the Washington Job Protection Agreement . . . shall be entitled to compensation computed in accordance with the provisions of said [WJPA]." Thus, Appendix E totally contradicts the maneuvering of Dr. Rosen and Claimants' counsel and expressly states that benefits are to be calculated in accordance with the WJPA.

In addition to their Complaints that specifically seek entitlement to benefits under the WJPA, even the Claimants' own representations in their 1990 Arbitration Brief show that displacement allowances are calculated according to Section 6(c) of the WJPA. The Claimants clearly stated: "In the event that the employee's pre-merger compensation exceeded his post-merger compensation, he was entitled to supplementary wages . . . **J.P.A. [WJPA] Sections 6(b) and (c)** (therein termed a "displacement allowance")."[38]

Even in the face of Section 6(c)'s clear language and the damaging admissions of Dr. Rosen in his report and on cross-examination, the Split Panel simply excused Dr. Rosen's failure to follow the WJPA's benefit calculations in Section 6(c) without citation to any authority.[39] Instead, the Split Panel deems Dr. Rosen's disregard of Section 6(c) as mere "deviations" from the contract.[40] Such a decision, untethered to any law, is totally irrational because it completely abrogates and contradicts the express requirements and terms of the MPA.

IV. The Award of $12.5 Million in "prejudgment interest" was Designed to Punish the Carrier.

[38] Claimants 1990 Arbitration Brief, pg. 3. (emphasis added). (Pursuant to Penn Central's Motion to Supplement the Record, a copy of the foregoing is attached hereto at Tab 2).
[39] Arbitration Award, pg. 106. (Appendix Vol. 5 at Appendix-2728).
[40] *Id.*

The Split Panel's outrageous award to the Claimants of more than $12.5 million in interest was imposed not based on the record or the law, but solely to punish the Carrier for an alleged delay in these proceedings.[41] However, as Dean Emeritus Tomain pointed out with the timeline of these proceedings in his Dissenting Opinion, the delay in this case rests solely on the Claimants by reason of their numerous appeals and on the judges and arbitrators hearing this case:

Merger Protection Agreement	May 20, 1964
Merger Effective	February 1, 1968
Claimants furloughed	Various times beginning February 21, 1968
Claimants file in US District Court	September 15, 1969
US District Court Dismisses Complaint	July 14, 1976
US District Court Orders Arbitration	November 29, 1979
First Arbitration Agreement	June 18, 1980
First Arbitration Panel Disbanded	1983
Second Arbitration Panel	1988
Arbitration Decision	June 22, 1992
Supplemental Arbitration Decision	July 16, 1994
Claimants' Appeal to ICC	November 16, 1994
ICC STB Board Denies Appeal	August 1, 1996
Claimants Refile with ICC STB	April 17, 1997
STB Decision	December 2, 1998
6th Circuit Decides Claimants' Appeal	December 22, 2000
Claimant's Move to Reopen in USDC	1998 & 2004
USDC Rules	February 18, 2005
USDC Rules	April 28, 2005
USDC Orders Arbitration	June 28, 2006
Split Panel Holds Hearing	December 10-13, 2007

Thus, from the time these suits were filed in 1969 until the recent arbitration, these cases have been on motion or appeal of the Claimants, and not Penn Central. Even Judge Oliver – although terribly misquoted by the Claimants and the Split Panel – held, in addressing Penn Central's laches argument, that the parties (and the system) were equally responsible for the delay in this case, and stated: "In assessing the causes of delay over the past five years, the

[41] The Split Panel held that "regardless of fault, Penn Central, and not the claimants, should bear the cost of the delay, and we are ordering that the award of merger protection benefits be enhanced by an award of prejudgment interest." Arbitration Award, pg. 116. (Appendix Vol. 5 at Appendix-2738).

Court concludes, based on Plaintiffs' letters calling for new mediation panels and a return to arbitration, that Plaintiffs are no more responsible than Penn Central for the delay . . . Defendant Penn Central seeks an equitable remedy of laches, but it bears at least as much responsibility as Plaintiffs for the recent delay in these cases."[42]

In further justification of their $12.5 million enhancement of the award, the Split Panel argues that the Carrier's alleged spoliation of evidence justifies such "enhancement," but at the same time finds that Penn Central did not spoil evidence. The Split Panel so held by stating that "these proceedings do not involve the type of egregious conduct that supports spoliation sanctions."[43] The Split Panel's ad hoc and irrational justifications for awarding prejudgment interest of over $12.5 million illustrates the punitive nature of their award and proves that it is simply a means of penalizing Penn Central without any evidentiary basis.

V. Conclusion.

It is time for the Board to impose a measure of finality on this 40-year proceeding by vacating the Split Panel's decision and entering judgment for Penn Central. Such a finding by the Board is just, proper and the only rational conclusion based on the record established at the hearing.

Long ago, when Judge Lambros referred this dispute to arbitration, he framed the issues by saying that:

> "[W]ere Plaintiffs placed in a worse condition with respect to their employment by reason of the merger;"[44] and
>
> "[T]he Plaintiffs now must come forward with evidence to support the position that there was compensation loss to which they are entitled to payment."[45]

[42] Appendix Vol. 3 at Appendix-1350.
[43] Arbitration Award, pg. 49. (Appendix Vol. 5 at Appendix-2671).
[44] Appendix Vol. 2 at Appendix-0694.
[45] Appendix Vol. 2 at Appendix-0710.

A decision to vacate the Split Panel's decision and enter judgment for the Carrier is just and proper because the Claimants failed to come forward with any evidence that their job loss was caused by the merger and failed to come forward with any evidence that they are entitled to compensation per the formula clearly set forth in the MPA. Judgment for the Carrier is especially appropriate because at the hearing Penn Central conclusively proved that any job loss suffered by the CUT Claimants was the result of a dramatic decline in passenger traffic at the CUT. Claimants did not offer one shred of evidence to rebut this fact. Consequently, the only rational decision for the Board – based on the Record and the law – is to vacate and enter judgment for the Carrier.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing was sent by electronic mail to the following on November 17, 2009:

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TAB 1

BEFORE THE ARBITRATION COMMITTEE

MICHAEL J. KNAPIK, et al., Claimants, v. PENN CENTRAL, Carrier.	:	Case No. 69-722
ROBERT WATJEN, et al., Claimants, v. PENN CENTRAL, Carrier.	:	Case No. 69-675
DAVID C. BUNDY, et al., Claimants, v. PENN CENTRAL, Carrier.	:	Case No. 69-947
G.V. SOPHNER, et al., Claimants, v. PENN CENTRAL, Carrier.	:	Case No. 74-914

CLAIMANTS' BRIEF IN OPPOSITION TO CARRIER PENN CENTRAL'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Railroad's Motion for Summary Judgment should be denied. Summary Judgment must be denied when there are genuine issues of material fact. In analyzing the issues on Summary Judgment, all facts must viewed in a light most favorable to the non-moving party, in this case, the Claimants.

Here, the overwhelming factual evidence is that: 1) the Claimants have fulfilled their obligations under the Merger Protection Agreement ("MPA"); and 2) the Railroad breached the MPA in failing to pay Claimant's their guaranteed benefits thereunder. The MPA is attached hereto as Exhibit A. Further, although it attempts to do so in a cursory fashion, the Railroad cannot demonstrate any business decline or other excuse for failure to pay said benefits under the MPA. "Business decline" is an explicitly defined term under the MPA. The Railroad's own "expert" witness, Michael Weinman testified that his opinion is not relevant to "business decline" or "causation" as defined in the MPA.

II. STATEMENT OF FACTS

A. Conditions of the Merger.

In 1964, the New York Central Railroad ("NYCR") and the Pennsylvania Railroad began the process of merging their operations. In order for the Railroads to merge, it was necessary for the railroads to obtain the approval of the Interstate Commerce Commission ("ICC"). 49 U.S. §5(2) revised and recodified at 49 U.S.C.A. § 11323-11326. In connection with its review of the proposed merger, the ICC, in this regulatory role, was required to make provisions for the protection of the employees of the merging railroads. *Id.* As a condition of the merger, the railroads agreed to the MPA. That agreement specifically provided that "none of the present employees of either of the said carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights or privileges pertaining thereto at any time during such employment." MPA at § 1(b). This language expanded the protections previously provided to union workers in the 1936 Washington Jobs Protection Agreement ("WJPA"). WJPA provided five years of benefits to displaced workers who could prove that their damages were proximately caused by a railroad merger.

These conditions were unacceptable to the unions in the new agreement. Under the MPA, the unions demanded, and won, lifetime guarantees under which the Railroad would assure all employees a guarantee payment.

Approval of the MPA by the employees was premised on these representations which were reflected in numerous publications and statements issued prior to the merger. *See, e.g. Headlight,* Exhibit B. Under the MPA, the Railroad could terminate workers, but was not excused from payment of these protective guarantees. The sole exception to this guarantee obligation occurred **only** under specific – and statistically defined – conditions of general business decline. The sole definition for the term "decline in merged company's business" is:

> [I]n the event of a decline in the merged company's business in excess of 5% in the average of both gross operating revenues and net revenue ton miles in a 30 day period compared by the average of the same period for the years 1962 and 1963, a reduction in forces in the craft represented by the organization signatory hereto may be made at any time during the said 30-day period below the number of employes entitled to preservation of employment under this Agreement to the extent of one percent for each one percent decline the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles divided by two. Advance notice of any such force reduction shall be given as required by the current schedule Agreements of the organization signatory hereto and such reductions shall be made in accordance with existing Agreements.

MPA at § 1(b).

To invoke the general business decline provision, this section of the MPA requires the Railroad to show: 1) across the merged company's system; 2) gross operating revenues on a monthly basis in 1962 & 1963; 3) gross operating revenues on a monthly basis during the layoff period; 4) net revenue ton miles on a monthly basis for the years 1962 and 1963; 5) net revenue

ton miles on a monthly basis for the layoff period; 6) that the average of the said decline exceeds 5%; and 7) that the Railroad had invoked this clause in advance by giving "advance notice of any such force reduction." This data was regularly tracked and reported by the industry at the time. *See e.g.* Exhibit C.

Defendant's expert Michael Weinman indicated he could not render an opinion on any of these required numbers. Weinman Deposition at page 52-53[1]. Exhibit D. Further, he has opined only on the decline of rail *passenger* traffic, not total traffic. Nowhere in the MPA is the term "decline in business" limited to passenger service. The "merged company" included both passenger and freight service. Similarly, Weinman pointedly failed to offer any opinion as to the Penn Central's entire system, or data on a monthly basis, or any opinion at all regarding causation. Defendant presented no evidence via its expert or otherwise that can meet this threshold equation.

B. Description of Claimants

Claimants are three separate groups of railroad employees; brakemen (Knapik group Case No. 69-722); carmen (Sophner group Case No. 74-914); and rate revision clerks (Watjen and Bundy groups Case Nos. 69-675 and 69-947) There is no dispute that the rate revision clerks were always NYCR employees in desk jobs allocating freight rates.

The brakemen and the carmen were employees of the NYCR since the time they hired on with the railroad and worked at NYCR-owned locations and at Cleveland Union Terminals ("CUT") owned locations. The CUT was an almost wholly owned subsidiary of the NYCR with identical offices. Arbitration testimony of George Ellert at 116, Exhibit E. Throughout the long

[1] Relevant portions of the Weinman deposition are attached hereto as Exhibit D.

history of this dispute, the Railroad has denied the Claimants their guaranteed benefits on the grounds that the MPA did not cover employees of the CUT. *Id.* at 84, 85, 92 and 92.

In 1974, the ICC ruled that the MPA did, in fact, cover CUT employees. *Pennsylvania Railroad Company – Merger – New York Central Railroad Company,* 347 ICC 536 (1974) Nonetheless, the Railroad ignored this ruling, refused to pay claimants, and further disputed the ICC's ruling in new fora. In 1976, the District Court yet again ruled that "as a matter of law that the plaintiffs are employees of the [NYCR] as that term is defined in the [MPA], and as that term applies to the job protection agreement and their job guarantee entitlement under the merger agreement." 1976 Order at 14, relevant portions attached as Exhibit F. The District Court went on to hold: "this issue is clear, that the plaintiffs were entitled to the full benefits of the job protection agreement, based on their combined wages of [CUT] and their [NYCR] work, and were entitled to this, not only as of 1969, but at all applicable times prior thereto." *Id.* at 15.

Again, the Railroad refused to obey the orders of the Court. At the subsequent arbitration, the Railroad demanded that Claimants litigate and prove that they were NYCR employees. Once again, the Claimants established that they were covered by the MPA.

This history is important for several reasons: first, it explains why the Railroad refused to allow Claimants to even file MPA guarantee forms, despite their repeated attempts to do so. *See* Arbitration testimony of Christ Steimle at 477, Exhibit G, the relevant portions of which are attached hereto as Exhibit G. The Railroad's position was that they were not entitled to such forms because they were not covered by the MPA. Second, the Railroad's legal position explains why during the subsequent bankruptcy, the Railroad never listed Claimants as creditors, and never made the required notice to creditors. Finally, this history of repeatedly litigating the same issue illustrates the lengths that the Railroad will go to deny the Claimants their rights.

The Railroad's position, that the CUT brakemen and carmen were not covered by the MPA is the sole reason they were not paid their benefits. Any later defenses raised by the Railroad are rationalizations of this basic premise.

III. CONTROLLING AGREEMENTS

A. The Controlling Agreements Have Already Been Submitted To the Panel.

Pursuant to this Panel's order, the Parties were required to submit all controlling documents by December 2006. Claimants identified (and submitted) their documents at that time. The Railroad submitted no controlling documents. Now, nearly a year later, and less than four weeks before arbitration, the Railroad claims that there are new and additional controlling agreements. They are not correct. The MPA and the implementing agreements covering those particular claimants govern the benefits awardable to the Claimants.

B. The Top And Bottom Agreement Is Separate From, And Unrelated To, The MPA.

The 1965 Top and Bottom Agreement is not controlling here. The Railroad's own witnesses, Stalder and Ellert, Assistant Manager of Labor Relations, both testified that the Top and Bottom Agreement had nothing to do with Railroad's obligations under the merger.

> Q. Right. Okay. I'm handing you what is a transcript of Mr. Stalder's testimony in the trial in 1976, and is it a correct statement that when asked the question, the top and bottom was not the one of these implementing agreements. It had nothing to do with what was to be done under the merger, did it? And his answer was, None whatsoever. Is that a correct reading of what Mr. Stalder said?
>
> A. That is correct.
>
> Q. And he was your supervisor?
>
> A. Yes, he was.

> Q. But that's in direct contradiction to what you just told us, isn't it? Didn't you just tell us that the 1965 top and bottom agreement was an implementing agreement?
>
> A. I think the record will show that it is not.
>
> ***
>
> Q. So therefore, the top and bottom agreement could by definition not be an implementing agreement of the merger protection agreement?
>
> A. It was a separate agreement entirely from the merger protection agreement.

Exhibit E at 101, lines 8-25, 103, lines 22-25 and 104, line 1. The Top and Bottom Agreement is clearly not dispositive of the rights of the claimants as derived from the MPA.

C. The 1969 Agreement Did Not Revoke The Railroad's Obligations Under The MPA.

The 1969 Agreement to which Defendant referred did not merge the CUT with NYCR as Defendant claims. In fact CUT continued to be a separate entity. The 1969 agreement was an attempt to resolve the obvious inequity to CUT workers by allocating 2.5% of the jobs at the freight yard to CUT employees because without this allocation they could not have access to any jobs. Even this allocation represented the equivalent of 9 jobs which meant most of the CUT men could not get work. Arbitration testimony of Raymond Beedlow at 243, Exhibit H. Therefore they were entitled to the MPA benefits.

IV. PROCEDURAL HISTORY

Claimants filed suit at various times between 1969 and 1974 on the basis that the Railroad had denied them benefits and therefor breached the terms of the MPA. Bundy and Watjen cases involving rate revision clerks were initially consolidated with each other but not with the other two cases.

Knapik and Sophner Cases

Because of the Railroad's refusal to properly recognize them as New York Central employees covered by the MPA, the Knapik group split: some workers felt by reporting to work they admitted lesser seniority and waived their rights; other workers chose to pursue their grievance and report to work with later seniority dates which yielded no work. The Blackwell arbitration panel denied benefits to both groups.

The Surface Transportation Board affirmed as to those who did not report but reversed and remanded the denial of benefits to those who reported to work. The appeal before the Sixth Circuit in *Augustus v. S.T.B., Penn Central* 2000 U.S. App Lexis 33966 involved the denial of benefits only to those who did not report to work. Initially the Railroad refused to participate in the arbitration on remand to determine benefits for those who returned to work. The District Court ordered the Railroad to return to arbitration before this panel.

Bundy and Watjen Cases

Judge Lambros granted summary judgment in favor of the union and the carrier. The Sixth Circuit affirmed the counts against the union and reversed on the claim against the carrier and remanded the case for the trial court to conduct an evidentiary hearing on whether the carrier frustrated the Plaintiffs' exercise of their rights and whether they were placed in a worse position. *Bundy, et al. v. Penn Central, et al.*, 455 F. 2d 277(6th Cir. 1972). The trial court never conducted that evidentiary hearing but sent the case to the arbitrators to conduct the fact finding hearing that is now scheduled before this panel.

V. ANALYSIS

A. Standard for Summary Judgment.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

> that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Summary judgment is not available where there is a genuine dispute of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In reviewing summary judgment motions, the Court views the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *White v. Turfway Park Racing Ass'n, Inc.,* 909 F.2d 941, 943-44 (6th Cir.1990).

B. The MPA Was Intentionally Drafted To Eliminate "Causation" As A Required Element.

The Railroad alleges that Claimants must prove that their damages were proximately caused by the merger. The Railroad's theory is that because the 1936 WJPA had a causation element, that, therefore, the MPA must have one also. This is not correct.

One of the goals of the merger was to maximize efficiency and to consolidate operations of the two carriers. The employees knew that such efficiencies would, by definition, include furlough and/or permanent layoff, and/or displacement of employees. Accordingly, in order for the Unions to approve the merger, they required wage and benefit guarantees that were different from the WJPA. The WJPA provided that:

> No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, **as a result of such coordination,** in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination. (Emphasis added.)

Exhibit A at Appendix A.

However, the language in the MPA is significantly, different:

> The provisions of the Washington Job Protection Agreement of 1936...shall be applied for the protection of all employees of Pennsylvania and Central...who may be adversely affected with respect to their compensation . . . **incident to approval and effectuation of said merger.** (Emphasis added.)

MPA Section 1(a), Exhibit A.

The Railroad then petitioned the Interstate Commerce Commission for approval of the merger. The Railroad represented to the ICC that this expanded protection was superior to the protections in the WJPA. The ICC in approving the merger ratified the lack of causal relationship:

> It must be recognized that applicants [the Railroad] have agreed to certain benefits greater than we have heretofore required of any section 5 applicant, e.g., the job-retention (attrition) and the limitations against reduction in force, which embrace protection from adverse effects **not causally connected** with the merger." (Emphasis added.)

Pennsylvania Railroad Company – Merger – New York Central Railroad Company, 327 ICC 475, 545.

The plain language of the MPA, as approved by the ICC, eliminated the WJPA's causation element. The ICC's order is part of the law of the case. It interprets the MPA and is conclusive as to the understanding of protections required by the government before any merger could occur. [2]

---

[2] The ICC in approving the merger further held:

Disputes are to be arbitrated – under a plan which we consider superior to that contained in the Washington Agreement. Applicants are willing to make the terms of the agreement available to all the employees whom we are required by law to consider in evaluating the proposed merger, including those not represented by the signatory unions.

Though they have in the past reduced the number of their employees by more than 50 percent over a ten-year period, the applicants, under this agreement will not be free to reduce their work

C. Penn Central's Chairman Agreed With The ICC.

In multiple hearings before the ICC and in other public appearances prior to the merger, the Chairman of the Pennsylvania Railroad Stuart T. Saunders stated: "[t]his agreement protects those men not only against the loss of jobs by reason of merger **but for any reason other than** resignation, death or dismissal for cause – in other words dismissal for discipline. These men are protected for life subject to retirement, death, resignation or discipline and **they can't lose their jobs for any reason.**" Saunders Speech to Council of New Castle, Dec. 16, 1965 at 21, relevant portions of which are attached hereto as Exhibit I (Emphasis added.). Saunders and the ICC both agreed: The job guarantees of the MPA were not conditional. Employees could not lose their jobs for any reason. There was no reason to allege, or prove, that the merger was the proximate cause.

D. Penn Central's Actual Practice In Paying Tens of Millions Of Dollars In Guarantees Shows That The MPA Does Not Require Proof Of Causation.

Penn Central's own understanding of the MPA can be seen through Penn Central's own actions. As can be seen in this litigation, Penn Central does not pay money unless it is absolutely required to do so. Penn Central had floors of lawyers to make sure that no penny was wasted. As a publicly-held corporation, it had an obligation to its shareholders to only pay valid

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force unless business contracts by more than 5 percent in any 30-day period, in which event the work force may be reduced one percent for each one percent business decline in excess of the said 5 percent. If the plan of the merger successfully materializes, however, and company growth results, new and additional jobs will be created. This, along with normal attrition and voluntary separation from employment of those who would rather not move to a new location, should enable the Transportation Company to maximize the proficient utilization of the retained work force.

The cost of protection provided by the agreement is estimated as $78 ¼ million, of which practically all would be payable over the first 8 years." *Id.* 543-44.

guarantee claims. Later, after it filed for bankruptcy in 1971, Penn Central had fiduciary obligations to deny any employee's wage guarantee request that was not proven.

What was Penn Central's understanding of its obligations under the MPA?

From 1968 to 1972, even as it claimed it was suffering a severe business decline, Penn Central paid out over $100 million in labor protection payments under the MPA. *The Wreck of the Penn Central*, Joseph R. Daughen and Peter Binzen (1971) at 315, relevant portions of which are attached as Exhibit J.[3] During this period of time, Penn Central claims that its passenger business declined sharply. This Arbitration Panel should first note that the "business decline" provision in the MPA specifies the use of data that is aggregated from the entire Penn Central system since the MPA refers to the "merged company's business." The MPA does not look solely at data from one city, from one region, or from one type of train service. Thus, any decline in business must affect the entire system in order this section to be invoked as a justification for any reductions in force.

If, as Penn Central erroneously claims, workers were required to prove that their layoffs were caused by the merger, and that the Railroad could deny benefits by simply claiming the layoffs were caused by lack of business (as opposed to the merger), then the Railroad could never have paid (in the middle of the most scrutinized bankruptcy in American history) millions of dollars to workers who were not entitled to any guarantee payments. The Railroad could have refused to pay such guarantees just by claiming that the adverse employment actions were caused by a business decline, not by the merger. The reason that Penn Central paid out these guarantees in the middle of its bankruptcy is simple: the MPA had no causation clause that would let Penn

[3] This book was cited as an authoritative resource by Defendant's expert Weinman. Exhibit D. page 80 lines 11-21.

Central refuse to pay the guarantee claims. The way Penn Central actually spent its money is the acid test of the MPA.

E. Penn Central's Own Guarantee Forms Establish That Causation Was Never Required Under The MPA In Order To Receive A Guarantee.

Penn Central's process for paying guarantees also proves its understanding of the MPA. Penn Central paid out literally hundreds of thousands of claims on nearly identical forms. These claims were paid at least through 1975 on claim forms of which three examples are attached as Exhibit K.

Penn Central produced several "bankers'" boxes of such forms. These forms show that the Railroad carefully scrutinized these forms and attempted, wherever possible, to reduce the amounts paid to workers. Railroad accountants frequently recalculated the guarantee payments down to the penny. The employees submitted the information required on the form and were paid the amount to which they were entitled. Significantly, these forms never requested that employees "prove" that their lack of work was "proximately caused" by the merger. At the time that it was actually implementing the MPA's labor protection guarantees, the Railroad never dared to allege that workers had to hire expert witnesses or economists to prove "proximate cause."

Forty years later, the Railroad cannot unilaterally change the MPA. Claimants were entitled to submit the same claim forms as any of the other protected workers. These forms never required proof of "proximate cause." The Railroad's forms did not require proof of causation because the MPA never contained a causation requirement. The Railroad's own forms are simply further proof of this fact.

F. The Railroad Negotiated A Specific "Business Decline" Clause Which Excludes Other Extra-Contractual Business Decline Defenses.

The Railroad and the Unions knew how to negotiate a clause to permit furloughs caused by a business decline. They decided to carefully specify and limit the circumstances under which the Railroad would be relieved of some of its MPA obligations. They specifically drafted a "business decline" clause.

A basic canon of construction is that "the inclusion of one, is the exclusion of all others." *Uram v. Uram*, 65 Ohio App.3d 96, 98 (Summit 1989); 18 Ohio Jur.3d 29, Contracts §12. The inclusion of this clause demonstrates that the Unions and Railroads intended that the Railroad would be required to meet the specified "business decline" factors in order to avoid MPA payments. The Railroad can only be absolved of liability if it can satisfy this definition of "business decline".

In *NY Susquehanna and W. Railroad Co. and Brotherhood of Railroad Signalmen ,Board of Adjstment,* 605, Dec.8, 1969, the arbitrator found that the specific method of calculating allowable percentage reduction had not been submitted by the carrier and thus it had "no contractual authority to furlough the claimants." Attached hereto as Exhibit L. Further, in *Brotherhood of Railway, Airline and Steamship Clerks and Missouri-Kansas-Texas Railroad, Special Board of Adjustment* 605, April 20, 1970 the arbitrator found that the business decline provision could not be invoked because the carrier had failed to give advance notice of any force reduction. Attached hereto as Exhibit M. Similarly, if the Railroad cannot meet the contractual definition of "business decline" it cannot invoke such a defense.

G. The Railroad Cannot Satisfy The Specific Requirements of the Business Decline Clause.

MPA Section 1(b) states the only "business decline" exception as:

> [I]n the event of a decline in the merged company's business in excess of 5% in the average of both gross operating revenues and net revenue ton miles in a 30 day period compared by the average of the same period for the

> years 1962 and 1963, a reduction in forces in the craft represented by the organization signatory hereto may be made at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent decline the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles divided by two. Advance notice of any such force reduction shall be given as required by the current schedule Agreements of the organization signatory hereto and such reductions shall be made in accordance with existing Agreements.

Exhibit A.

Defendant has never demonstrated the requisite percentage decline in business to justify its refusal to pay MPA benefits. The MPA includes both freight and passenger service. In fact, the language of the equation is in "ton miles" which refers to freight. See Weinman deposition at Exhibit D. page 50 lines 19-22

Defendant's only witness, its expert Weinman, admitted that ton miles have nothing to do with passenger service:

> A. Our mission was to determine the state of the passenger business. The Merger Protection Agreement doesn't really address the state of the passenger business, nor was it intended to.
>
> * * *
>
> Q. In your response you say, "The MPA formulae dealt only with freight indices. It was silent in regard to the passenger business which, according to most sources, was the single biggest cash outflow that Penn Central and many other railways had in this era." And then you go on there's another paragraph in that response. Is that accurate?
>
> A. That's correct.

Exhibit D. page 49 line 22 – page 50 line 11.

H. The Railroad's Expert Admits That His Report Is Not Relevant To the MPA's Business Decline Clause.

The Railroad's expert Weinman was not asked nor did he give an opinion as to the nature or application of the job protection provisions of the MPA

> Q. Your expert report, I'm correct, am I not, that it did not render an opinion as whether the Merger Protection Agreement applies to these particular plaintiffs?
>
> A. That's correct, it does not indicate anything in that regard.
>
> Q. You weren't asked to do that?
>
> A. That's correct.
>
> Q. You don't have -- do you have an opinion in that regard?
>
> A. No, I don't.
>
> ***
>
> Q. You didn't render any opinion in your expert report regarding the nature of the job protections in the Merger Protection Agreement; is that true?
>
> A. That's true.
>
> Q. And is it true that you've not been asked to do that?
>
> A. That's true.
>
> Q. And is it also true that you don't have any opinion in that regard? Is that true?
>
> A. That's true.

Exhibit D. page 90 lines 4 – 14 and page 91, lines 1-11.

I. Defendant's Expert Admits That None Of His Testimony Relates To The Claimants' Rights Under the MPA.

Weinman freely admitted that he examined only some aspects of passenger service and never attempted to evaluate freight service or the existence of a general "business decline."

> Q. And you're not in the position -- is it true that you're not in the position to determine whether the furloughs for any of the individual plaintiffs would be justified based on the paragraph that's in Exhibit 3?
>
> A. That's correct, we are not in such a position.
>
> Q. Okay. And you're not -- and you're not an expert in that area, are you?
>
> A. Not in freight business areas.
>
> Q. Have you been asked to provide any additional reports on any issues?
>
> A. None that haven't been discussed here today.

Exhibit D. at page 53 line 23 -- page 54 line 11.

In fact Weinman admits that he did not have data for the merged company to compare with 1962 and 1963 data.

> Q. Is it -- without the New Haven data for '62 and '63, is it possible to compare data for the merged companies?
>
> A. I don't believe we had any information on the New York Central in '62 and '63 either, and so it would not be possible to make a comparison of the two as predecessors of the merged company for those two years.

Exhibit D. page 62 lines 6-13.

J. Even The Railroad's Counsel Recognized That Their Expert Had Failed To Opine On Any of The Relevant Issues.

After receiving their expert's first inadequate report, Defense counsel asked expert Weinman to opine on specific issues relating to the MPA. See, Weinman E-mail attached as Exhibit N. In his reply, Weinman explains to Defense Counsel that his report cannot answer any

of the issues relevant to this litigation. *Id.* Four weeks later at his deposition, Weinman admitted that his report does not even address the business decline provision in the MPA Section 1 (b):

> Q: Your report -- am I correct that your report does not address the issue of whether there was a business decline that necessitated a furlough based on the provision that you just read?
>
> A. That's correct.
>
> Q. You weren't asked to do that?
>
> A. That's correct, we were not.
>
> Q. You weren't. But you were asked -- you were asked if you -- you were asked to do that in the e-mail that Mr. Groppe sent you. That was his first issue, right?
>
> A. We were asked to comment on it.
>
> Q. Well, he says to you, "Did Penn Central have a business decline that necessitated a furlough based on Merger Protection Agreement formula." That's what you just -- that's the formula that you have in front of you?
>
> A. That's correct.
>
> Q. So he's asking you whether -- is he not asking you whether there was a business decline that necessitated a formula or necessitated a furlough based on the formula in Exhibit 3?
>
> A. That's correct. And our response, of course, was that it couldn't be determined since this, the Merger Protection Agreement as presented here in Exhibit 3, is silent on the business of passenger service.
>
> ***
>
> Q. Theoretically, there would be data that could be input into that formula to get an answer as to whether -- as to whether it's been complied with or not; isn't that true?
>
> A. The answer would be "yes" if you were asking with regard to freight issues and "no" if you were asking in regard to passenger issues.

Q. No if you were asking in regard to passenger issues because it doesn't deal with passenger issues; is that what you're saying?

A. That's correct.

Q. Do you have the data to determine whether the formula would necessitate a furlough based on freight data?

A. No, we do not have any information with regard to that.

Exhibit D. page 52 lines 23 page 53 line 13.

Weinman admits that he could not help Defendant prove the answer to whether there was a general business decline as the term is defined in the MPA, which is the only issue relevant to this defense.

Q. Did he know prior to the e-mail that you couldn't answer Question Number 1?

A. I can't answer that. I don't know what he knew.

Exhibit D. page 73 lines 14-17

Similarly, Weinman's latest affidavit provides no testimony regarding business decline. Weinman could not opine and has not attempted to compute the data necessary to determine whether the railroad could lay workers off without paying MPA benefits. Therefore although Mr. Weinman has provided an interesting historical narrative of passenger service, it has no relevance to the specifically-defined equation mandated in the controlling language of the MPA with reference to applicable business decline.

Accordingly the business decline defense mounted by the carrier cannot meet the requirements of the MPA Section 1 (b). Thus, not only must summary judgment be denied, but this panel should strike Weinman's irrelevant testimony and this defense as not applicable to the terms of the MPA.

K. The Railroad Knows How To Properly Calculate "Business Decline" And Has Done So In the Past.

The Railroad's purported uncertainty or inability to determine "business decline" is unusual. Over the years, the Railroad did in fact calculate the business decline percentage to determine whether it could reduce costs by laying off workers under other agreements which required the same or similar percentage of loss of gross revenue.

The Railroad regularly tracked these numbers to determine whether they could make furloughs. For example, in a memo from D.C. Bevan, Chairman of the Finance Committee of the Pennsylvania Railroad l to Stuart Saunders of July 26, 1967, Bevan calculated that net ton miles were above the 1963-64 base period and thus are not sufficient to trigger the business decline clause. Bevan memo July 26, 1967. Ex C. See also memo of April 21, 1966, memo of Sept. 1, 1965. *Id.* Bevan wrote that "[r]ealistically, the language of the contract means that layoffs may be made only if the ton-mile-operating revenue average drops by 6 percent below the base period average . . . . Unless PRR traffic shrinks far more than now anticipated, it does not seem that any layoffs can be accomplished during July 1967, under terms of this Agreement. The average percentage would have to drop by an additional 6.83 percent for the clause to be invoked." *Id.* In the 1960s, the Railroad was tracking these numbers to determine in advance whether it could provide the notice necessary to invoke the business decline clause.

L. The Issue of Causation Has Already Been Decided by the STB.

The MPA does not require proof of causation. However, to the extent it has relevance, the STB has already disposed of the causation issue. With respect to causation, the Surface Transportation Board held:

> the record shows that the claimants who reported for work **suffered losses as a result of the merger** .

STB at 7.

***

> The jobs for which the claimants were expected to "stand" were not actual jobs. The claimants experienced a drop in income immediately after they reported for work in the freight yard and their drop in income was not due to sickness, discipline or failure to exercise seniority rights. (footnotes omitted).

STB at 8. The STB serves as the law of the case because the Knapik portion of the case is before this panel on remand from the STB. The STB decision is dispositive in favor of the claimants on the causation element, having found that the prior panel "erred egregiously and failed to observe the imposed labor protection conditions in summarily denying benefits to the claimants who reported for work at the freight yard." STB at 9. Therefore as Judge Lambros had held 20 years earlier, the STB viewed the proceeding on remand as a damages-only action.[4]

M. In The Alternative, There Is A Genuine Dispute of Fact As To Whether The Merger Caused The Job Losses.

The Railroad is wrong in arguing that Claimants must prove that their damages were proximately caused by the merger. However, even if the MPA required proof of proximate cause (which it does not), there is sufficient evidence to permit a reasonable fact finder to hold in Claimants' favor. First, the Claimants in the Knapik group were furloughed within twenty-six days of the consummation of the merger. There was nothing different during this period of less than four weeks. There was no sudden downturn in four weeks of merged operations. A reasonable fact finder could determine that the merger caused the furloughs. Indeed, that is exactly what the STB held as noted *supra.*

For example the seniority roster of the CUT gave claimant Christ Steimle a seniority position of no. 58. Exhibit G at 512. The consolidated NYCR roster gave him a seniority

[4]*See* 1976 Order at 15. This action "is best tried in the context of the damage question. . . ." *See also Id.* at 24.

position of no. 506. Roster, Arbitration exhibit 3 attached hereto as Exhibit O. Mr. Steimle testified that despite marking up for work with a loss of seniority of more than 400 places, he could not secure a job, except on the "extra board" to relieve someone on vacation or on sick leave. Exhibit G at 643-644. On cross examination George Ellert, an assistant director of labor relations, admitted that claimants were not called back to regular full time positions which provided a specific number of hours of work. Exhibit E at 154-157. *See also* Beedlow arb test., Exhibit H at 258. Mr. Steimle's experience was indicative of the collective experience of the Knapik and Sophner groups.

With respect to the Bundy, Watjen group, the railroad abolished and consolidated their office jobs as a result of the restructuring. Discharge notice attached hereto as Exhibit P. The Claimants' furloughs were the result of the consolidation of the railroads which was anticipated and was the reason the MPA was enacted.

The issue of whether their loss of work was caused by the merger is -- at the very least -- a fact question for the panel. However, the mere existence of this purported issue would come as a surprise to the unions which negotiated the MPA, the ICC which approved it, the workers who received MPA guarantees in the 1970s, the bankruptcy creditors who apparently lost millions unnecessarily, and Penn Central itself which created the forms and paid the guarantees. Causation is not part of the MPA.

N. Claimants All Returned to Work and Took All Actions Necessary To Assert Their Claims Under The MPA.

All of the brakemen and carmen whose claims are before the panel returned to work for the merged company. Their service is documented in the records of the Railroad Retirement Board. The railroad issued notices to which the claimants responded, but could not "bump" into

jobs with their seniority. Claimants' letter of May 19,1969 to the carrier verified the fact that they had or did thereafter report to work. Letter of May 19,1969 attached hereto as Exhibit Q.

For example by the admission of the railroad witness, Mr. Ellert, assistant director of labor relations, claimant Ken Day reported for work and thus exercised his seniority in 1969-1974, but the tax records show he was not given his guarantee. Ellert testimony, Exhibit E at 169-170. Each of these individuals worked in whatever position they could get, usually with reduced hours because of their loss of seniority. See arbitration testimony of Beedlow, Exhibit H at 250-252.

Augustus v. Surface Transportation Board, 2000 U.S. App. LEXIS 33966 (6th Cir. 2000) is factually distinguished from the situation of these claimants. As opposed to the seven claimants in that case who never returned to work, the ten claimants who are before this panel reported to work and took what they could get.

If the railroad believed that the claimants had not complied with the availability for work standard, it could have fired them for cause. It did not, instead it took them back to whatever work they could get with their seniority. Steimle arbitration affidavit, attached hereto as Exhibit R.

Similarly the Bundy/Watjen fulfilled all of their obligations under the MPA but were nevertheless denied coverage. The six rate revision clerks were notified at various times in early 1969 that their jobs were being abolished. The claimants were ordered to exercise their seniority within a ten-day period pursuant to Appendix A of the MPA. They attempted to exercise seniority rights in their home district Detroit. Mr. Sheper told them they could not exercise their seniority. In response the claimants demanded their separation allowance. The Railroad failed to respond to their demand for separation allowance in any way. Instead it ordered them to respond

to recall which they did, with no seniority, and were treated as new employees. The affidavit of claimant Franz explains why the Sixth Circuit remanded the case for an evidentiary hearing which has not yet been held. Affidavit of Phil Franz, Exhibit S.

O. The Railroad Has Waived Its Affirmative Defenses.

Fed.R.Civ.P. 8(c) states in pertinent part: "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense." Pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, an affirmative defense is waived if not raised in the first responsive pleading. *See Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir.), cert. denied, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976); *United States v. Masonry Contractors Assoc. of Memphis*, 497 F.2d 871 (6th Cir.1974); *Crawford v. Zeitler*, 326 F.2d 119, 121 (6th Cir.1964); *see also Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416, 1427 (D.C.Cir.1986); *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190 (7th Cir.1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985). See 999 v. C.I.T. Corp., 776 F.2d 866, 870 n. 2 (9th Cir.1985) (failure to raise an affirmative defense in pleadings ordinarily waives that defense).

Here, the Railroad did not assert any "avoidances or affirmative defenses" in its answers to Claimants' lawsuits. A defense based upon a purported prior breach is an affirmative defense which must be pled to avoid waiver. *Ben Kozloff, Inc. v. H & G Distributors, Inc.*, 1989 WL 152280 (N.D.Ill.)("Defendant's paragraphs 4 and 5, defendant's set-off and plaintiff's prior breach, fall within the ambit of 'any other matter constituting an avoidance or affirmative defense', Fed.R.Civ.P. 8(c), in that they admit the matters in the complaint but suggest some other reason why there is no right of recovery.") *citing, 5 Wright & Miller, Federal Practice and Procedure: Civil* § 1270 p. 292 (1969), quoting from the original Advisory Committee. "The

universal rule is, that if one be sued on a contract of any character executed by him, he must, in order to avoid liability, show a lawful excuse for his failure to perform. This is an affirmative defense, the burden of proving which is cast upon him, and the statute does no more than provide what shall constitute this affirmative defense in actions within its purview." Hanlon V. J. E. Miller Transfer & Storage Co., 149 Ohio St. 387, 79 N.E.2d 220, 37 O.O. 87 (1948). The Railroad's argument that it is not required to pay Claimants because Claimants have allegedly failed to comply with MPA is an affirmative defense. *Fonar Corp. v Tomsco Imaging*, Inc. 46 F.3d 1123, 1995 WL 5883 (4th Cir. 1995)(Prior breach is an affirmative defense).

Claimant's cases have been pending for nearly forty years. It is now far too late for the Railroad to allege, and seek to prove as a factual matter, that Claimants somehow failed to comply with some part of the MPA.

P. The Railroad's Repudiation Of Its Obligations To Claimants Under The MPA Relieves Claimaints Of Their Obligations To Perform.

The Railroad cannot announce to Claimants that it will not recognize their rights under the MPA, deny its own obligations under the MPA, and then allege that the Claimants failed to file MPA forms or comply with any other purported obligations under the MPA. It is well-settled that, where one party to a contract refuses to perform under the terms of the contract, an anticipatory repudiation is said to occur. *W.O.M., Ltd. v. Willys-Overland Motors, Inc.*, 6th Dist. No. L-05-1201, 2006-Ohio-6997, ¶ 30, *citing Daniel E. Terreri & Sons v. Bd. of Mahoning Cty. Commrs.*, 152 Ohio App.3d 95, 105, 2003-Ohio-1227, ¶ 44; *Restatement of the Law 2d, Contracts* (1989), 272, Section 250(A).

Section 251 of the Restatement of Contracts 2d states: "(1) Where reasonable grounds exist to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand

adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance." Repudiation "need not be absolute in order to justify non-performance by the other party, and in some cases at least it must be true that the privilege of non-performance will be or become permanent." 5 *Williston on Contracts* (1937) 4102, Section 1467. *See also, 84 Ohio Jurisprudence* 3d (1988) 319, Specific Performance, Section 41 ("[I]f the other party repudiates the contract and makes it certain that he does not intend under any circumstances to comply therewith, or if he absolutely and unconditionally refuses to proceed with the contract, the law excuses the absence of tender on the part of the other party, as equity does not require idle acts.")

In *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264 (7th Cir. 1996) the Seventh Circuit considered whether a Defendant can announce that it will not perform a contract, but still demand strict compliance by the Plaintiff. The Seventh Circuit rejected this argument, noting that "[a]s our colleagues on the Second Circuit have held, New York law provides that 'a party to a contract may be precluded from insisting on strict compliance by conduct amounting to a waiver or estoppel.'" *Id. quoting Peter A. Camilli & Sons, Inc. v. State*, 41 Misc.2d 218, 223, 245 N.Y.S.2d 521, 527 (Ct.Cl.1963); *see also, Sunshine Steak, Salad & Seafood, Inc. v. W.I.M. Realty, Inc.*, 135 A.D.2d 891, 892, 522 N.Y.S.2d 292, 293 (3d Dept.1987) ("where it becomes clear that one party will not live up to a contract, the aggrieved party is relieved from the performance of futile acts or conditions precedent"); *Allbrand Discount Liquors, Inc. v. Times Square Stores Corp.*, 60 A.D.2d 568, 568, 399 N.Y.S.2d 700, 701 (2d Dept.1977) ("[o]nce it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts"), appeal denied, 44 N.Y.2d 642, 405 N.Y.S.2d 1026, 376 N.E.2d 935 (1978). . . . In light of the forthright repudiation, requiring

Credit to give Chameleon or CBI notice of a default would have been a pointless gesture." *Credit Agricole*, 90 F.3d at 1275.

Moreover, the Seventh Circuit held that the plaintiff "is entitled to 'expectation damages,' which means Credit should be placed 'in the same economic position it would have been in had both parties fully performed.' *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720, 728-29 (2d Cir.1992); *see Menzel v. List*, 24 N.Y.2d 91, 97, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969)." *Id.* at 1276.

In a similar case, the Ninth Circuit, applying Arizona law, recently held that compliance with a two-day notice provision is not required where it would amount to a "useless gesture." *L.K. Comstock & Co. v. United Eng'rs & Constructors Inc.*, 880 F.2d 219, 232 (9th Cir.1989) (citing 2 Corbin on Contracts § 1266, at 442 (C. Kaufman Supp.1984)); *see also Craddock v. Greenhut Constr. Co., Inc.*, 423 F.2d 111, 115 (5th Cir.1970) (contractual condition excused where it "was a useless gesture") (applying Florida law). Thus, the Railroad is estopped from compelling a futile act. The Railroad waived the requirements of the MPA when it pointedly told Claimants that they would never be paid any guarantees.

Q. The Railroad's Actual Breach Of The MPA Relieved Claimants Of Any Reciprocal Obligations.

The Railroad did not just threaten to breach the MPA - they smashed it. The Railroad was required to pay guarantees to defendants but it refused to do so. A breach of contract excuses the non-breaching party from further performance under the contract. *Roberts v. GMS Management Co., Inc.*, 1999 WL 1068370 (Ohio App. 8 Dist.) *See also Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 170; *Pearson v. Huber Investment Corp.* (Mar. 21, 1985), Franklin App. No. 84AP-526,. Defendant's breach excuses the plaintiff from any further performance. *See Bd. of Commrs. of Clermont Cty. v. Village of Batavia* (Feb. 26,

2001), Clermont App. No. CA2000-06-039. In other words, a "material" breach entitles a plaintiff to stop performing. *Kersh v. Montgomery Dev. Ctr.* (1987), 35 Ohio App.3d 61, 62-63, 519 N.E.2d 665. *See, also, Shanker v. Columbus Warehouse Ltd. Partnership* (June 6, 2000), Franklin App. No. 99AP-772 ("Even if plaintiffs * * * breached the agreement, defendant's non-performance is not excused unless plaintiff's breach was material"); *Sun Design Sys., Inc. v. Tirey* (Apr. 19, 1996), Miami App. No. 95-CA-46 ("It is well-established that a 'material breach of contract by one party generally discharges the non-breaching party from performance of the contract'").

CONCLUSION

Defendant's Motion for Summary Judgment must be denied. In approving the merger, the ICC determined that the MPA provided expanded job protections which were "not causally connect with the merger." The Defendant cannot demonstrate "business decline" as defined by the MPA. The Claimants fulfilled their obligations under the MPA as dispositively determined by the STB. In their Motion, the Defendant makes numerous errors of law. Even if the Defendant were not in error as a matter of law, there remain numerous genuine disputes of material fact which preclude summary judgment. For all the foregoing reasons, summary judgment should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL J. KNOPIK, ET AL.	)	CASE NO.: C 69-722
	)	
PLAINTIFFS	)	
	)	
VS.	)	
	)	
PENN CENTRAL CO., ET AL.	)	
	)	
DEFENDANTS	)	

PLAINTIFFS' ARBITRATION BRIEF

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I. STATEMENT OF FACTS

Plaintiffs are railroad employees who seek to recover damages for the refusal of Defendant Penn Central Company (hereinafter "Defendant," "railroad," or "Penn Central") to provide them benefits under a 1964 "Agreement for Protection of Employees in Event of Merger of Pennsylvania and New York Central Railroads" (hereinafter "Merger Protection Agreement" or "M.P.A."). (Plaintiffs' Exhibit 1) The Merger Protection Agreement, effective January 1, 1964, was entered into between the carriers then contemplating a merger--the Pennsylvania and New York Central Railroads--and the unions representing the employees of those two carriers.

The Merger Protection Agreement covered all employees who worked for either carrier between January 1, 1964, and the date of consummation of the merger. Such employees were defined as "present employees." M.P.A. Section 1(b). The Merger Protection Agreement provided in part that, notwithstanding the merger,

> ...none of the present employees of either of the said Carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and

privileges pertaining thereto at any time during such employment.

Id.

The second portion of the above-quoted passage ("...placed in a worse position...") extends, without time limitation, protections previously afforded railroad employees under Section 5(2)(f) of the Interstate Commerce Act and Section 6(a) of the Washington, D.C. Job Protection Agreement of May, 1936 (hereinafter "Job Protection Agreement" or "J.P.A."). Those sections protect employees against being placed in a "worse position" as a result of a merger for a period of four or five years, respectively, from a fixed date (in the case of Section 5(2)(f), from the date of I.C.C. approval of the merger; in the case of Section 6(a), from the date of the merger itself.)

The first portion of the above-quoted passage ("...none of the present employees of either of the said Carriers shall be deprived of employment..."), however, represents a significant addition to the protections that had been established by the Interstate Commerce Act and Job Protection Agreement. That clause, unequivocal in its terms, can only be interpreted in one way: as a lifetime job guarantee.

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The Merger Protection Agreement contained other benefits as wel and further, incorporated by reference all of the protections set forth the Job Protection Agreement. The benefits described in these two document include the following:

1. In the event that the employee's pre-merger compensatio exceeded his post-merger compensation, he was entitled t supplementary wages. (Plaintiffs' Exhibit 1) M.P.A Appendix E; J.P.A. Sections 6(b) and (c) (therein termed "displacement allowance"). For reasons that will be discussed later, it is important to note that Appendix E of the Merger Protection Agreement identified May 16, 1963 to May 16, 1964 as the "base period" for computing an employee's pre-merger compensation;

2. An employee affected by a coordination would "not be deprived of benefits attaching to his previous employment, such as free transportation, pensions, hospitalization, relief, etc..." J.P.A. Section 8.

3. At the time of a "coordination" (merger), an employee could exercise his option to resign and accept a "separation allowance." J.P.A. Section 9.

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Plaintiffs were hired by the New York Central Railroad (hereinafte "New York Central") on various dates between 1943 and 1951.[1] As New Yor Central employees, they worked at a number of locations operated by th Cleveland Union Terminals Company (hereinafter "Cleveland Union Terminals" o "C.U.T.") and New York Central. C.U.T.'s initial purpose was to construct a passenger station and terminal. Its operating costs were paid by the various railroads, in direct proportion to their use of those facilities. C.U.T. was used primarily by the New York Central Railroad, which eventually controlled approximately ninty-three percent (93%) of its stock.[2]

Plaintiffs worked as "brakemen" (also known as "switchmen"), coupling and uncoupling railroad cars. Crews consisted of about five people, with the foreman of each crew referred to as a "conductor."

As passenger rail traffic dwindled, Plaintiffs' union, the Brotherhood of Railroad Trainmen (hereinafter "B.R.T."), secretly negotiated with the New York Central Railroad. During the course of those negotiations, discussions apparently took place "as to a method of canvassing C.U.T.

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[1]As examples of their status as New York Central employees, see Plaintiffs' Exhibits 4-20.

[2]By 1962, ten of New York Central's fourteen officers were also directors and/or officers of C.U.T.

yardmen to ascertain which of them are desirous of working in Collinwood yard..." Letter from C.L. Stalder, Assistant General Manager for Labor Relations, New York Central Railroad, to Walter Grady, Deputy President, B.R.T. and Walter Hahn, General Chairman, B.R.T., September 9, 1964. However, no such canvassing ever took place.

The negotiations resulted in a "Top and Bottom" Agreement, effective February 16, 1965, which provided for a seniority roster consolidation of the New York Central (Cleveland Terminal District) yard service employees and the C.U.T. yard service employees. The agreement stated that yard service employees of C.U.T. would be placed on the New York Central seniority roster (the Freight Yard roster) following the most junior employee currently on that roster, and that the C.U.T. employees would then be placed on the roster in the same order as they appeared on the C.U.T. Company Yardmen's Seniority Roster. However, under the Top and Bottom Agreement, all C.U.T. employees who were placed on the New York Freight Yard roster would receive a New York Central seniority date of September 10, 1964 and would be denied the right to use their true and significantly earlier seniority dates. Further, the Top and Bottom Agreement, while it provided for roster consolidation, never stated that Plaintiffs were New York Central employees, and never stated that

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Plaintiffs were covered by the Merger Protection Agreement.[3] Plaintiff and other union members affected by this agreement were not made aware of th existence of the 1965 Agreement prior to its adoption by union officials Interestingly, R.E. Swart, who signed the Top and Bottom Agreement in hi capacity as "General Chairman, B.R.T., New York Central Railroad--Western District," became the Director of Labor Relations for New York Central just 2 1/2 months later.

Between the date of the Top and Bottom Agreement and the date of the merger, three other agreements were entered into by the Pennsylvania and New York Central Railroads and their employees, represented by the Brotherhood of Railroad Trainmen. These agreements covered various employment matters that would be affected by the merger.

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[3]In fact, paragraph 9 of the Top and Bottom Agreement strongly suggests that Plaintiffs were not covered:

> This agreement is for the sole and specific purpose of combining the present separate seniority rosters and will not change the application of any joint or separate agreements now in effect between any or all of the parties and will not be construed to change the respective seniority districts or territories in any way.

Concerned that their rights were not being fully protected, Plaintiffs repeatedly attempted to obtain from the railroad confirmation of their status as New York Central employees, covered by the Merger Protection Agreement. The railroad failed, refused to provide Plaintiffs with such confirmation.

The Pennsylvania and New York Central Railroads merged on February 1, 1968. Plaintiffs were furloughed on February 25, 1968. At that time, they were directed to "stand for work" in the New York Central freight yard, pursuant to the 1965 Top and Bottom Agreement. See letter from A.B. Cravens, Transportation Superintendent, Penn Central, February 21, 1968. (Plaintiffs' Exhibit 30) Plaintiffs were reluctant to follow this dictate from the railroad, for the following reasons.

First, given the railroad's repeated refusal to confirm their status as New York Central employees, Plaintiffs logically reasoned that Penn Central was trying to deny them coverage under the Merger Protection Agreement altogether.

Second, because of Defendant's position that C.U.T. employment was not synonymous with New York Central employment, Plaintiffs reasonably believed that acceptance of work in the new Penn Central freight yard on or

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after February 25, 1968, the date of their furlough, would have left th outside the scope of M.P.A. coverage, since M.P.A. coverage was limited t those who had worked for either the Pennsylvania or New York Central Railroa between January 1, 1964 and February 1, 1968. Plaintiffs' position wa buttressed by statements made to them by officials from their union, wh concluded that, if plaintiffs accepted work in the freight yard afte February 1, 1968, "The Carrier would no doubt consider you as a Penn-Centra employee who was not protected under any of the existing protectiv agreements."[4]

Third, even assuming Penn Central recognized their coverage under the Merger Protection Agreement, the September 10, 1964 seniority date imposed on Plaintiffs by the Top and Bottom Agreement arguably put them outside the protection of a key M.P.A. provision, wage supplementation in the event pre-merger compensation exceeded post-merger compensation. (M.P.A. Plaintiff's Exhibit 1) This was because that provision used May 16, 1963 to May 16, 1964 as the "base period" for computing an employee's pre-merger compensation. Applying the September 10, 1964 seniority date, Plaintiffs

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[4]Letter from John A. Lyons, General Chairman, Brotherhood of Railroad Trainmen, to Michael J. Knapik, June 25, 1968. (Plaintiffs' Exhibit 38)

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would have no earnings within the "base period" from which pre-merger compensation could be computed.

Fourth, Plaintiffs viewed the September 10, 1964 seniority date dictated by the Top and Bottom Agreement as stripping them of seniority to which they were entitled. As New York Central employees, their seniority should be based on their original date of hire as recognized by the Railroad Retirement Board.

Fifth, Plaintiffs were not required to apply for jobs in the freight yard, since those jobs did not constitute "comparable work," and/or were of a different "class and craft." In this regard, The Merger Protection Agreement prohibits employees from being placed in a worse position with respect to "working conditions," M.P.A. Section 1(b); the 1936 Job Protection Agreement prohibits employees from being placed in a worse position with respect to "rules governing working conditions," J.P.A. Section 6(a).

Finally, Plaintiffs knew that, with a seniority date of only September 10, 1964, it would be impossible for them to obtain permanent, full-time work in the freight yard.

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Plaintiffs were concerned that the acceptance of freight yard job would have constituted a waiver of all other rights and benefits to whic they were entitled. That would have meant, at best, only partial M.P.A coverage and a reduced seniority date; at worst, no coverage whatsoever unde the Merger Protection Agreement. Confronted with this lack of options, several of the Plaintiffs concluded that they had no choice but to reject "mark up" in the freight yard, and fight for the job protections they hac earned after 15-25 years of employment with the railroad.

Plaintiffs and Defendant continued to exchange communications, subsequent to the furlough concerning Plaintiffs' employment status. On numerous occasions, Plaintiffs attempted to obtain clarification from the railroad as to whether they were covered by the Merger Protection Agreement. See, e.g., letter to D.J. Weisbarth, General Yardmaster, Penn Central, May 7, 1969. (Plaintiffs' Exhibit 46) By letter dated May 2, 1969, Defendant again ordered Plaintiffs to report for work in the freight yard. The company then warned Plaintiffs that by "[f]ailing to do so you will forfeit all seniority on the Cleveland Union Terminals Company as well as on the Penn Central..." (Plaintiffs' Exhibits 43, 44, 45) On June 23, 1969, Defendant informed eleven of the Plaintiffs that:

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> Since you have not reported for service in Collinwood or Rockport Yards as directed by my letters of May 2nd and May 26th, 1969, you have forfeited all seniority pursuant to...the...1965 agreement.
>
> Letter from D.J. Weisbarth, General Yardmaster, Penn Central, June 23, 1969. (Plaintiffs' Exhibit 48)

See also letter from C.L. Stalder, Superintendent - Labor Relations & Personnel, Penn Central Railroad, to R.V. Brinkworth, Division Superintendent, Penn Central Railroad, July 2, 1969: (Plaintiffs' Exhibit 49)

> Due to their failure to respond to recall notice dated May 16, 1969, as required by Article 6 of the Agreement effective February 16, 1965, the following named men have forfeited all seniority in the Cleveland Union Terminal as well as Penn Central Company and will not be considered employees of either Carrier. These men will not be called for any service whatsoever as their relationship with the Carriers has been severed...

An agreement was reached July 11, 1969, among Penn Central, C.U.T., and the employees of both carriers represented by the United Transportation Union (formerly B.R.T.) which, inter alia, purported to extend Merger Protection benefits to Plaintiffs. Several problems existed with this agreement, however. First, it provided that 2.5% of the total yard work in the new, merged yard territory would be designated for former C.U.T.

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yardmen. This allocation established only about seven jobs for the employee who had worked in the C.U.T. territory. As a result, the vast majority o workers furloughed were still left without jobs, in contravention of th lifetime job guarantee contained in the Merger Protection Agreement. Second, the 1969 Agreement did not become effective until more than seventeen months after the date of the furlough. By its silence on the subject, the Agreement suggested that Plaintiffs were not entitled to any compensation for the underemployment or unemployment they suffered during that period, again in violation of the Merger Protection Agreement. Third, a number of the furloughed employees had received termination notices from Penn Central prior to the effective date of the 1969 Agreement. See, e.g., letters from D.J. Weisbarth and C.L. Stalder, supra. At best, the 1969 Agreement was ambiguous as to whether it applied to such employees; at worst, it left them completely outside the coverage of the Merger Protection Agreement.

A majority of the Plaintiffs did return to work for Defendant. However, even as to those Plaintiffs, Penn Central refused to provide the benefits mandated by the Merger Protection Agreement.

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II. PROCEDURAL STATUS/LAW OF THE CASE

Plaintiffs filed suit in U.S. District Court (N.D. Ohio) in 1969 The suit charges that Penn Central "placed Plaintiffs in a worse position b depriving them of employment, compensation, fringe benefits, seniorit rights, prior working conditions, rights and privileges and coordinatio allowances," in violation of the Merger Protection Agreement, Job Protectio Agreement and Interstate Commerce Act. Complaint paragraph 9.

The case, in bifurcated form, went to trial before a jury in 1976. At the close of Plaintiffs' case during the first stage of the trial, the Court, upon motions for directed verdict, made several rulings, including the following:

1. Plaintiffs, as a matter of law, "are employees of the New York Central Railroad as that term is defined in the [M]erger [P]rotection [A]greement, and as that term applies to the [J]ob [P]rotection [A]greement and their job guarantee entitlement under the [M]erger [Protection] [A]greement." Transcript, supra at 14. (Plaintiffs' Exhibit 54)
2. Plaintiffs, as a matter of law, "were entitled to the full benefits of the [J]ob [P]rotection [A]greement, based on their

combined wages of C.U.T. and their New York Central work, a were entitled to this, not only as of 1969, but at a applicable times prior thereto." Transcript, supra at 1! (Plaintiffs' Exhibit 54)

The Court then framed for consideration in another proceeding th only remaining issue in the case:

> [W]hether or not there was a breach of that contract [the 1964 Agreement] by the railroad, and/or a compliance by the [P]laintiffs with the terms of that [A]greement so as to entitle them to the benefits.
>
> Transcript, supra at 24; 1979 Order, infra at 2. (Plaintiffs' Exhibit 54)

In 1979, the Court issued an Order that, inter alia, referring all of the cases to arbitration. An arbitration was conducted in 1983.

However, the District Court in 1985 vacated the arbitration ward.

Settlement negotiations commenced shortly thereafter, but proved fruitless. As a result, this matter has again been directed to arbitration.

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III. ARGUMENT

A. Introduction

Although Defendant contended otherwise, it has been established as matter of law that Plaintiffs are employees of the New York Centra Railroad. Transcript, July 14, 1976 at 14 (Lambros, J.). (Plaintiffs Exhibit 54) Similarly, it has been established as a matter of law tha Plaintiffs are, and always have been, covered by the Merger Protectio Agreement. Transcript, supra at 14-15. Defendant Penn Central furloughe Plaintiffs, and did not provide Plaintiffs with the benefits mandated by the Merger Protection Agreement. Demonstration by Plaintiffs that they complied with the terms of the Merger Protection Agreement entitles them to damages. Transcript, supra at 24; 1979 Order at 2. (Plaintiffs' Exhibit 55) Defendant relies upon Plaintiffs' decision not to accept freight yard work as evidence of their non-compliance with the terms of the Agreement. M.P.A. Section 1(b).[5] (Plaintiffs' Exhibit 1) Such reliance, however, is misplaced.

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[5]Section 1(b) of the Merger Protection Agreement states in part that:

> An employee shall not be regarded as deprived of employment or placed in a worse position...in case of his...failure to obtain a position available to him in the exercise of his seniority rights...

B. Defendant's Refusal To Recognize Plaintiffs As Covered By The Merger Protection Agreement Constituted An Anticipatory Breach Of Contract Entitling Plaintiffs To Damages.

1. Plaintiffs are covered by the Merger Protection Agreement.

As noted in the Statement of Facts, the Court made several key rulings in its 1976 Order. (Plaintiffs' Exhibit 54) Two of those rulings conclusively established that Plaintiffs are covered by the Merger Protection Agreement. First, the Court held, as a matter of law, that Plaintiffs:

> are employees of the New York Central Railroad as that term is defined in the [M]erger [P]rotection [A]greement, and as that term applies to the [J]ob [P]rotection [A]greement and their job guarantee entitlement under the [M]erger [Protection] [A]greement.
>
> Transcript, July 14, 1976, at 14 (Lambros, J.) (Plaintiffs' Exhibit 54)

Second, the Court determined that Plaintiffs, again as a matter of law,

> were entitled to the full benefits of the [J]ob [P]rotection [A]greement, based on their combined wages of C.U.T. and their New York Central work, and were entitled to this, not only as of 1969, but at all applicable times prior thereto.
>
> Transcript, supra at 15. (Plaintiffs' Exhibit 54)

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Based on these holdings, there can be no doubt that Plaintiffs, at all times, have been covered by the Merger Protection Agreement.

2. Defendant steadfastly refused to recognize Plaintiffs as covered by the Merger Protection Agreement.

Defendant maintained until 1976, when the Court ruled otherwise, that Plaintiffs were not New York Central employees and not covered by the Merger Protection Agreement. For example, in its Answer to Plaintiffs' Complaint, Defendant asserted that Plaintiffs "were employees of the Cleveland Union Terminals Company," and that "The Cleveland Union Terminals Company and its employees were not parties specifically provided for by the [Merger Protection Agreement]." Answer paragraph 1. (Plaintiffs' Exhibit 53)

Further evidence of Defendant's position exists in the Interstate Commerce Commission proceedings conducted to determine whether employees of those Penn Central subsidiaries not operated directly by the parent company, including C.U.T., were covered by the Merger Protection Agreement. Throughout those proceedings, which began in 1969, Defendant contended that Plaintiffs were employees of one of its subsidiaries, and that such employees were not entitled to the benefits of the Merger Protection Agreement. 347 I.C.C. 536, 539-540. The I.C.C. ruled to the contrary, on November 6, 1974. Id. at 552. (Plaintiffs' Exhibit 61)

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Additionally, it appears that in its communications with Plaintiffs through their union, both before and after the date of their furlough, Defendant took the position that Plaintiffs were not covered by the Merger Protection Agreement. For example, on January 2, 1968, the General Chairman of the B.R.T. explained to a union member, who was one of those furloughed the following month, that:

> The Carrier has continued to hold to the position that the C.U.T. is not included in the proposed merger; and the employees are, therefore, not entitled to [the] protection [of the Merger Protection Agreement].
>
> Letter from John A. Lyons, General Chairman, B.R.T., to Henry Anderson, January 2, 1968. (Plaintiffs' Exhibit 28)

See also letter from Lyons to Raymond Beedlow, May 29, 1968. (Plaintiffs' Exhibit 34)

Finally, the trial testimony of Defendant's representative confirms Defendant's position that Plaintiffs were not covered by the Merger Protection Agreement. C.L. Stalder, Assistant General Manager of Labor Relations for New York Central, testified that, as of the date Plaintiffs were furloughed (February 25, 1968), it was the railroad's position that Plaintiffs were not New York Central employees. (Plaintiffs' Exhibit 58)

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Transcript, July 8, 1976, at 7. Mr. Stalder maintained that position a least as far back as November, 1964. Transcript, supra at 6-7. With regar to the Merger Protection Agreement itself, the following exchange illustrate Defendant's position:

> Q [As of February, 1968], Mr. Stalder, was there any question in your mind that the men on the C.U.T. roster, the Plaintiffs in this case, were not covered under the protection of this November 11, 1964 agreement?
>
> A I knew they were not because the Cleveland Union Terminal was not a part of the merger.
>
> Q So they were what was known in the agreement as unprotected employees?
>
> A They were not involved in that agreement whatever.
>
> Transcript, supra at 5. (Plaintiffs' Exhibit 5)

The position taken by Defendant at these different stages--in its pleadings, before the I.C.C., in its discussions with the union, and at trial--makes clear that it steadfastly refused to recognize Plaintiffs as covered by the Merger Protection Agreement.

3. Defendant's position constituted an anticipatory breach of contract.

At all times prior to Plaintiffs' furlough, Defendant's refusal to recognize Plaintiffs as covered by the Merger Protection Agreement

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constituted an anticipatory breach of contract. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts demonstrating an intention to refuse to perform in the future. 17 Am. Jur. 2d Contracts Section 448. Section 253 of the Restatement of Contracts, Second defines anticipatory breach of contract, or "repudiation", as follows:

> (1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.

See also 17 Am. Jur. 2d Contracts Sections 428, 449; United Corp. v. Reed, Wible and Brown, Inc., 626 F. Supp. 1255, 1257 (D.V.I. 1986).

By consistently asserting that Plaintiffs were not parties to the Merger Protection Agreement, and thus not entitled to M.P.A. benefits, Defendant repudiated its contract obligations.

4. As a result of Defendant's anticipatory breach of contract, Plaintiffs were not required to mark up for the freight yard jobs.

Employing a standard contract analysis, Plaintiffs' alleged obligation to mark up for work in the freight yard is an express condition

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precedent to the railroad's duty to pay benefits.[6] Under this analysis, Defendant's anticipatory breach of contract relieved Plaintiffs of any such obligation. Section 255 of the Restatement provides as follows:

> Where a party's repudiation contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.

As official comment (a) to this section notes,

> ...No one should be required to do a useless act, and if, because of a party's repudiation, it appears that the occurrence of a condition of a duty would not be followed by performance of the duty, the non-occurrence of the condition is generally excused...

See also 5 Williston on Contracts 3d Section 699; 17 Am. Jur. 2d Contracts Sections 428, 449. In this case, because of Penn Central's "repudiation"--its assertions that Plaintiffs were not covered by the Merger Protection Agreement--it appeared to Plaintiffs that "the occurrence of a condition"--their marking up for the freight yard jobs--would not be followed by "performance of the duty"--Defendant's extension of Merger Protection benefits to Plaintiffs. As a result, the "non-occurrence of the

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[6]Because Plaintiffs' rights are founded in contract, traditional contract principles should be employed to interpret the facts in this case.

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condition"--Plaintiffs' decision not to mark up for work in the freigh yard--is excused. Marking up for the freight yard jobs would also have bee a "useless act" because there simply was not enough work in the freight yar for the furloughed employees.

From another perspective, Defendant cannot claim that it was in an way prejudiced by the actions of those Plaintiffs who did not mark up fo work in the freight yard, since the result would have been the same even i they had done so: such Plaintiffs still would not have received jobs, or i the alternative, M.P.A. benefits. This is apparent from the experience o those Plaintiffs who did mark up for freight yard work.

Numerous federal courts have adopted a position consistent with §25 of the Restatement, in a variety of factual situations. See e.g., Preload Technology v. A.B. & J. Construction Co., Inc., 696 F. 2d 1080 (5th Cir. 1983) (contract between general contractor and subcontractor); Cedar Point Apartments v. Cedar Point Investment Corp., 693 F. 2d 748 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983), on remand 580 F. Supp. 507 (E.D. Mo. 1984), judgment affirmed as modified 756 F. 2d 629 (8th Cir. 1985) (contracts for the sale of real property); Hidalgo Properties, Inc. v. Wachovia Mortgage Co., 617 F. 2d 196 (10th Cir. 1980) (standby loan commitment agreement); Record Club of America, Inc. v. United Artists Records, Inc., 80 Bankruptcy

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Rptr. 271 (S.D. N.Y. 1987) (licensing agreement); United Corp. v. Reed, Wibl and Brown, Inc., supra (contract for the sale and leaseback of constructio equipment); Alabama Football Inc. v. Greenwood, 452 F. Supp. 1191 (W.D. Pa 1978) (employment contract of professional athlete).

One federal appellate court has applied the concept of anticipator breach of contract to a factual situation involving railroad employee affected by a merger or acquisition. In New Orleans and Northeastern Railroad Company v. Bozeman, 312 F. 2d 264 (5th Cir. 1963), the railroad sought permission from the I.C.C. to acquire Meridian Terminal Company. Pursuant to 49 U.S.C.A. Section 5(2)(f), the I.C.C., while authorizing the acquisition, prescribed certain conditions for the payment of monetary allowances to employees if their employment was adversely affected as a result of the transaction. The I.C.C.-imposed conditions also included an arbitration clause that could be invoked by either party "'[i]n the event that any dispute or controversy arises with respect to the protection afforded by the foregoing conditions...'" Id. at 266. That clause further called upon the parties to reach agreement as to the formation, duties, procedure and expenses of the arbitration committee. Id.

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Subsequent to the acquisition, the railroad laid off several employees. When those employees attempted to invoke the protections afforded by the I.C.C.-imposed conditions, the railroad balked, claiming that such layoffs did not result from the acquisition. When the employees tried to resolve this dispute through arbitration, as provided in the I.C.C.-imposed conditions, the railroad stated that it was unwilling to do so. Thereafter, the railroad filed a declaratory judgment action on both the substantive (employee coverage) and procedural (referral to arbitration) questions. The trial court held in relevant part that the employees "'...had a vested right to submit this controversy to arbitration...'" Id. at 267.

Affirming the decision below, the Court of Appeals held that the language of the railroad's refusal to submit the matter to arbitration

> ...could not be construed other than a flat denial of the appellees' right to insist on arbitration. Under these circumstances appellees had every right to rely upon this refusal as an anticipatory breach of the agreement to arbitrate without the necessity of their taking any other preliminary steps towards setting up an arbitration panel.
>
> Id. at 268 (emphasis added).

In Bozeman, the railroad's anticipatory breach of I.C.C.-imposed conditions relieved the railroad employees of their duty to further perform

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pursuant to such conditions. Similarly, Penn Central's anticipatory breach of the Merger Protection Agreement relieved Plaintiffs of any further obligations they might have had to mark up for work in the freight yard.

The question of whether these Plaintiffs had an obligation to mark up for the freight yard jobs has already been decided in another forum. After being furloughed, a number of the Plaintiffs filed for unemployment benefits through the Railroad Retirement Board. At the first two levels of administrative review, Plaintiffs received adverse determinations. These were based on Defendant's assertions that their unemployment was simply the result of their unwillingness to accept such work. Plaintiffs appealed. After a hearing, the referee at the final administrative level reversed the decision below, holding that:

> Under the uncertain conditions surrounding appellants' standing on the respective seniority rosters of two railroads, because of the suitability of the work they might now be required to do by virtue of their relatively low standing on the consolidated roster, and in view of their questionable and apparently unresolved status as protected employees under the Penn Central merger agreement, it is understandable that these appellants might have some trepidation about accepting work at the Collinwood Yard. Consequently, it is ruled that appellants' failure to accept work off the consolidated roster does not, of itself, establish that they are not available for work within the meaning of the Act. All of

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> them have many years of service in the railroad industry, and there is no reason to suppose they are otherwise unavailable for work.
>
> Referee's Decision at 5.

The referee's analysis constitutes an analysis based on Defendant's anticipatory breach of contract. In the context of unemployment compensation, "availability for work" is the express condition precedent to an employee's receipt of benefits. Occurrence of that condition is excused by Defendant's "repudiation"--in the referee's words, the uncertainty created by Defendant as to 1) Plaintiffs' seniority rights, 2) their obligation, if any, to accept work of a different type than they had previously performed, and 3) their "status as protected employees under the Penn Central merger agreement..." Thus, for the same reasons as those cited by the Railroad Retirement Board referee, Plaintiffs were justified in not marking up for work in the freight yard.

5. Plaintiffs are entitled to damages for Defendant's anticipatory breach of contract.

As previously stated, Defendant's "repudiation alone [of its obligations under the Merger Protection Agreement] gives rise to a claim for damages for total breach." 2 Restatement of Contracts 2d Section 253 (1) supra. See also, Cedar Point Apartments, supra; 3 A's Towing Co. v. P & A

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Wall Service, Inc., 642 F. 2d 756 (5th Cir. 1981); Crouch v. Crouch, 566 F. 2d 486 (5th Cir. 1978). Plaintiffs are entitled to damages based on Defendant's depriving them of employment and/or placing them in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto. M.P.A. Section 1(b). The specific measure of damages will be briefly discussed infra.

C. Based On The Position Originally Adhered To By Defendant, Plaintiffs Were Justified In Not Marking Up For Work In The Freight Yard

Defendant would have this Arbitration Panel believe that its position has always been as follows:

> [T]he railroad's position is that these people, after they were furloughed from the C.U.T. roster, because of the unavailability of work, were then able to exercise the benefits which they had acquired, and their exclusive bidding rights that they had acquired pursuant to the top and bottom agreement in the Cleveland Freight Yards.
>
> The railroad's position is that there was work available and that they did not avail themselves of that work, and thus the railroad's position is that pursuant to the job protection agreement, that they lost and waived and rendered themselves ineligible for job guarantee benefits in view of the fact that they did not accept work that was available to them.
>
> Transcript, July 14, 1976 at 23 (Lambros J.). (Plaintiffs' Exhibit 54)

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Explained another way, Defendant now asserts that it has always agreed that Plaintiffs were covered by the Merger Protection Agreement, but that Plaintiffs lost their right to benefits by failing to report to work in the freight yard.

This is, simply, inaccurate. The Court itself was aware that Defendant's original position was based on the opposite premise: that Plaintiffs, as employees of a subsidiary, were not New York Central employees and therefore not covered by the Merger Protection Agreement (as previously mentioned, this is also the position that Defendant took in proceedings before the I.C.C.). The Court stated:

> The railroad took the position that we are not merging subsidiaries. We are only merging the Penn Central and the New York Central.
>
> Transcript, July 14, 1976 at 38 (Lambros, J.). (Plaintiffs' Exhibit 54)

The circumstances compel the conclusion that Defendant shifted its position in light of the rulings issued by the Court in 1976. By doing so, Defendant was able to fashion a line of defense that is not expressly contradicted by the Court's 1976 rulings.

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Those Plaintiffs' decision was justified given the circumstances that confronted them at that time. The Arbitration Panel must view that decision in its historical context--i.e., based on the information to which Plaintiffs had access in 1968. In this regard, it is of no consequence that a federal court would, eight years later, rule that Plaintiffs are covered by the Merger Protection Agreement. Rather, as of February, 1968, Plaintiffs knew only that their employer steadfastly held that they were not covered by the 1964 Agreement.

Based on that information, and believing that they were entitled to Merger Protection benefits, some Plaintiffs felt that they had no choice other than to reject the offer of employment in the freight yards. Plaintiffs did so primarily based upon the belief that accepting such work would have permanently barred them from obtaining benefits under the Merger Protection Agreement, since taking the freight yard jobs could have been construed as a waiver and acceptance of the railroad's position at that time. See Transcript, July 14, 1976 at 23-24 (Lambros, J.). (Plaintiffs' Exhibit 54)

Plaintiffs' concern, that reporting to/accepting work in the freight yards would be construed as a waiver of their right to M.P.A. benefits, was well-founded. Under common law principles, the railroad's breach--its refusal

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to provide M.F.A. benefits--could be waived by Plaintiffs.[7] As one authority states:

> Strict and full performance of a contract by one party may be waived by the other party, in which case there is, to the extent of the waiver, no right to damages for the failure to perform strictly or fully. This is in accord with the elementary general principle that either party to a contract may waive any of the provisions made for his benefit...[W]aiver [of contract provisions]...may be implied from the acts of the parties [footnotes omitted].
>
> 17 Am. Jur. 2d Contracts Section 390.

Numerous federal courts have addressed the concept of waiver. See, e.g., Chicago College of Osteopathic Medicine v. George A. Fuller Co., 776 F. 2d 198, 202 (7th Cir. 1985) ("Waiver may be proven by words or deeds of the party against whom waiver is invoked that are inconsistent with an intention to insist on that party's contractual rights."); Lone Mountain Production Co. v. Natural Gas Pipeline Co., 710 F. Supp. 305, 311 (D. Utah 1989) ("If [the non-breaching party] has intentionally relinquished a known right, either

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[7]Consideration of common law principles, such as waiver, are entirely appropriate, since Plaintiffs' rights in this case are founded in contract.

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expressly or by conduct inconsistent with an intent to enforce that right, he has waived it and may not thereafter seek judicial enforcement [citations omitted]."); Matter of B.J. Thomas, Inc., 45 Bankruptcy Rptr. 91, 96 (M.D. Fla. 1984) ("[W]here a party to a contract acts in such a manner as to indicate that he does not intend to hold another to a contract provision, he may be deemed to have waived his right to enforce the provision [citation omitted].").

A number of federal cases have arisen in the specific context of employment contracts. In Barker v. Sac Osage Electric Cooperative, Inc., 857 F. 2d 486 (8th Cir. 1988), for example, the employer, apparently unhappy with its employee's performance, negotiated with him to resign. As part of the settlement, the employer agreed to make certain payments to the employee in addition to severance and vacation pay. Such payments were timely made by the employer, and accepted by the employee. Later, the employee filed suit, alleging the employer had violated other terms of the settlement. The employer contended that the employee had waived the breach of contract by accepting its benefits. The Court of Appeals agreed, stating:

> Where a contracting party, with knowledge of the breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach.
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> Id. at 490.

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Cases such as this stand for the proposition that certain actions o employees could be construed as a relinquishment of rights against thei employer for the latter's breach of the employment contract. As a result Plaintiffs in the instant case were justified in their concern that reportin to/accepting work in the freight yards would jeopardize their right t benefits under the Merger Protection Agreement.

The facts in this case represent a perfect illustration of th doctrine of equitable estoppel. The doctrine in its traditional form state that:

> a party (1) who is guilty of a misrepresentation of existing fact including concealment, (2) upon which the other party justifiably relies, (3) to his injury, is estopped from denying his utterances or acts to the detriment of the other party.
>
> Calamari and Perillo, Contracts Sectior 11-29(b) (3d Ed. 1987).

See also 28 Am. Jur. 2d Estoppel and Waiver Sections 26 et seq.; Apponi v. Sunshine Biscuits, Inc., 809 F. 2d 1210 (6th Cir. 1987), cert. denied 108 S. Ct. 77; Teamster's Local 348 Health & Welfare Fund v. Kohn Beverage Co., 749 F. 2d 315 (6th Cir. 1984), cert. denied 471 U.S. 1017; Warner Mfg. Corp. v. Ashland Oil, Inc., 606 F. Supp. 852 (N.D. Ohio 1984), stay denied 606 F. Supp.

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866; Minnesota Min. & Mfg. Co. v. Blume, 533 F. Supp. 493 (S.D. Ohio 1978), aff'd 684 F. 2d 1166 (6th Cir. 1982) cert. denied 103 S. Ct. 1449, cert. denied 103 S. Ct. 2110. One effect of an equitable estoppel is to preclude what would otherwise be a good defense. 28 Am. Jur. 2d Estoppel and Waiver Section 33.

The facts of the case at bar satisfy all of the requirements of the above definition. Defendant was guilty of misrepresenting to all Plaintiffs that they were not covered by the Merger Protection Agreement. Plaintiffs relied on this "misrepresentation of existing fact" by electing not to stand for work in the freight yard. Such reliance was obviously detrimental since it resulted in Defendant's termination of Plaintiffs' employment and/or its refusal to award them Merger Protection benefits. In light of Plaintiffs' detrimental reliance on Defendant's original position, Defendant should be estopped from now denying that position. To allow Defendant to do otherwise would run contrary to the principles upon which this equitable doctrine is based.

Based on Defendant's original position, Plaintiffs were justified in their decision not to mark up for work in the freight yard. In other words, Plaintiffs' decision was reasonable in light of the circumstances with which

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they were confronted in February, 1968. Defendant therefore cannot rely upo that decision in defense of its position that it is not obligated to provid benefits under the Merger Protection Agreement.

D. Because The Freight Yard Jobs Did Not Constitute Comparable Work Plaintiffs Were Justified In Not Marking Up For Them.

While Section 1(b) of the Merger Protection Agreement requires eacl railroad employee "to obtain a position available to him in the exercise of his seniority rights" as a condition precedent to Merger Protection coverage, it also prohibits the railroad from, inter alia, placing the employee "in a worse position with respect to...working conditions..." (Plaintiffs' Exhibit 1) In other words, before an employee is required to accept a new position, the work of the new position must be comparable to that of his old position. In the instant case, the freight yard work for which Plaintiffs were directed to stand was of a materially different nature, and varied in virtually every respect, from the work of their former positions. These new positions, therefore, did not constitute comparable work, and/or were of a different class and craft.

Formerly, Plaintiffs would move relatively few cars at a time and for limited distances. The movements were customarily made with active engagement

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of the air brake systems of the cars at all times, and usually those brake systems were under the Plaintiffs' direct control by means of tail- or brake pipe hoses. There was no engine-detached switching. "Consists" of passenger trains did not vary from day to day, and switching movements in connection with these trains were consistent and patterned. The terminal area contained relatively few tracks, and the number of switching movements occurring at a given time was limited. Movements were further structured and anticipated by published passenger train schedules. Claimants were also protected from extreme weather by the proximity of the Terminal Building.

In the freight yard, however, Plaintiffs would be required to handle any number of cars at one time or throughout a tour of duty, over a large geographical area. Freight car switching was routinely done without air brakes activated, permitting potential unexpected rerolling of any car or cars moved. Working, or simply walking, around cars that might suddenly and without warning move would be especially dangerous for Plaintiffs, who had previously grown accustomed to cars being secured by air brakes during all switching movements. Even on the few occasions when the air brakes were activated on freight cars during yard switching, Plaintiffs rarely would have had any control over them themselves. In the freight yard, detached, "flat

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switching" or "kicking" was usually performed, whereby cars are initially propelled by a locomotive, uncoupled while underway, and then switched onto various tracks while freely rolling. Several cars or "cuts" (groups of cars) might be moving independently of each other simultaneously during such switching. With two or more crews at work busily switching cars in or near the same location of the freight yard, conflicting movements or overlapping patterns of car movements would present particular difficulties for Plaintiffs, unaccustomed to such a large volume of movements on a maze of yard tracks lying so close together.

Visibility in the freight yard was inferior, especially during inclement weather or at night. As to the latter, Plaintiffs, stripped of the vast majority of their seniority, were placed far down the New York Central freight yard roster. To the extent any jobs were available to Plaintiffs, such jobs generally would have been the least desirable ones occurring during the third "trick"--the 11:00 p.m. - 7:00 a.m. shift.

Further, there was no protection from severe weather for long periods while various duties required Plaintiffs to traverse the yard, on foot, away from the switch engine or shelter. It was not uncommon for the "field man" of

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the switching crew to be out in the yard throwing switches or performing othe remote tasks without returning to the protection afforded by the locomotive o some other shelter, except for a few brief minutes, for an entire tour o duty.

The increased hazard posed by these conditions cannot b understated. The problem was compounded by Defendant's failure to provide an training whatsoever to familiarize them with the equipment and safe work practices, so that Plaintiffs could protect themselves from the markedly increased dangers of freight yard work. The fact that a former passenger yard brakeman accepted a position in the freight yard, and then was horribly injured and permanently disabled in an accident while working there, demonstrates both the hazards intrinsic to the work, and the necessity for proper training in safe work practices.

The dangers were further exacerbated by the refusal of the freight yard employees to assist Plaintiffs in any way. This grew out of the anger of the freight yard employees over having Plaintiffs included on their roster pursuant to the 1965 Agreement. Even though Plaintiffs were put on the bottom of that roster, their mere presence on it assured that there would be fewer overtime assignments available for the original freight yard workers. The

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freight yard employees resented this infringement on their livelihood, an showed their resentment by treating their new co-workers antagonistically This hostility coupled with the inherant dangerousness of the job in light o the extreme differences between passenger and freight signals, etc. made th work in the freight yard treacherous and thus in no way comparable.

For these reasons, Defendant's offer of employment in the freight yard was not an offer of comparable employment. Rather, Defendant's actions were similar to a constructive discharge. See Taylor v. Southern Railway Co., 258 F. Supp. 257 (E.D.N.C. 1966), affirmed 376 F. 2d 665 (4th Cir. 1967) (interpreting similar language, the Court held that the duties of the plaintiff/railroad employee were so substantially altered, subsequent to the acquisition of the railroad for which he worked by another, that his job was "abolished" rather than "changed", and that he was therefore entitled to benefits as an employee who had been placed in a "worse position" as a result of such acquisition). Defendant, therefore, cannot rely upon Plaintiffs' decision not to mark up for work in the freight yard in defense of its refusal to provide benefits under the Merger Protection Agreement.

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IV. DAMAGES

Because the issues in this arbitration have been bifurcated, the question of damages will not be addressed at this time. As a general matter, however, if Plaintiffs prevail on the question of liability, they would be entitled to compensatory damages for lost wages and benefits, incidental and consequential damages, plus interest thereon.

V. CONCLUSION

Prior to and at the time of Plaintiffs' furlough on February 25, 1968, Defendant refused to recognize Plaintiffs as New York Central employees and thus entitled to the benefits of the Merger Protection Agreement. Such refusal constitutes an anticipatory breach of contract, and relieves Plaintiffs of any obligation they may have had to report for work in the freight yard. Marking up for freight yard work would have been a particularly futile gesture, since there were not enough jobs there available to Plaintiffs.

Further, Defendant maintained the above position until 1976. At that time, the Railroad was forced to reverse its position by virtue of Judge

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Lambros' findings of fact/conclusions of law, and the carrier then claimed that Plaintiffs were covered by the Merger Protection Agreement, but lost their right to benefits by failing to mark up for work in the freight yard. Plaintiffs' decision not to report for such work was based on the position originally taken by the railroad. In light of Plaintiffs' detrimental reliance thereon, Defendant should be estopped from asserting its current position as a defense. Examination of the circumstances as they existed at the time of Plaintiffs' furlough establish that Plaintiffs were justified in their decision not to mark up for the freight yard jobs.

Finally, the freight yard jobs in question did not constitute comparable work and/or were of a different class and craft, and thus Plaintiffs were not required to accept such jobs under the Merger Protection Agreement. For this reason as well, Defendant cannot rely on Plaintiffs' decision not to accept the freight yard jobs as a defense.

Plaintiffs were faithful employees of the railroad for 15-25 years. At the time of the merger, they stood ready, willing and able to continue to serve as employees of Penn Central, if Penn Central had been willing to confirm Plaintiffs' rights to Merger Protection benefits and even their status as New York Central employees. Because the Defendants refused to do so, and

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because the U.S. District Court has ruled that Plaintiffs were entitled t such benefits, Defendant is liable for damages based on its wrongful termination of Plaintiffs' employment and/or withholding of Merger Protectior benefits.

RESPECTFULLY SUBMITTED,

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BEFORE THE SURFACE TRANSPORTATION BOARD

PENNSYLVANIA RAILROAD COMPANY	)	
	)	
--MERGER--	)	Finance Docket No. 21989 (Sub.-No. 4)
	)	(Arbitration Review)
NEW YORK CENTRAL RAILROAD COMPANY	)	

PENN CENTRAL TRANSPORTATION COMPANY'S MOTION FOR LEAVE TO FILE A SUR-REPLY AND MOTION TO SUPPLEMENT THE RECORD IN RESPONSE TO CLAIMANTS' BRIEF IN OPPOSITION TO PETITION FOR REVIEW OF ARBITRATION AWARD

Penn Central Transportation Company ("Penn Central") hereby moves the Board for leave to file a sur-reply (attached hereto as Exhibit A) to Claimants' Brief in Opposition to Penn Central's Petition for Review of Arbitration Decision. Additionally, Penn Central moves to supplement the record with two documents (attached hereto as Tabs 1 and 2 to Exhibit A) that were filed with the Split Panel, but not included in the Appendix previously submitted because these documents did not become relevant until it became necessary to rebut statements in the Claimants' Brief in Opposition. Moreover, the sur-reply is necessary for Penn Central to further clarify arguments in light of the Claimants' Brief in Opposition, to respond to inconsistent arguments contained therein, to respond to arguments raised by Claimants that were not addressed in Penn Central's Petition, and to ensure just resolution of these proceedings, especially in light of the voluminous record that has been submitted on appeal.

While 49 C.F.R. 1104.13(c) normally does not permit sur-replies, 49 C.F.R. § 1100.3 states that "[t]he rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented," which grants the Board discretion to consider a sur-reply. *American Train Dispatchers Association v. CSX Transportation, Inc.*, ICC Finance Docket 28905 (Sub.-No. 24), 1990 ICC LEXIS 358 (Nov. 9, 1990). Indeed, it is within the Board's

discretion to permit otherwise impermissible filings, *King County, WA—Acquisition Exemption—BNSF Railway Company*, STB Finance Docket No. 35148, 2009 STB LEXIS 35148 (Served on Sept. 18, 2009). An otherwise impermissible filing is particularly appropriate where, as here, it "provides a more complete record, clarifies arguments, will not prejudice any party, and does not unduly prolong the proceeding." *Id.*

Good cause exists here for the Board to allow Penn Central's sur-reply which provides clarification and a more complete record because the Claimants' Brief in Opposition raises internally inconsistent arguments and arguments that were not addressed in Penn Central's Petition for Review of Arbitration Decision. "In the interest of a more complete record" the Board has accepted a "reply to a reply" despite 49 CFR 1104.13(c) and over objection of the opposing party. *CSX Transportation, Inc.—Petition For Declaratory Order*, STB Finance Docket No. 33388, 2008 STB LEXIS 524 (Served on Aug. 27, 2008); *Savannah Port Terminal Railroad, Inc.—Petition For Declaratory Order—Certain Rates and Practices As Applied to Capital Cargo, Inc.*, STB Finance Docket No. 34920, 2008 STB LEXIS 300 (Served on May 30, 2008).

In the context of arbitration review, the Board has accepted and considered a reply to a reply where "no party will be prejudiced by such action." *Canadian Pacific Ltd., et al.—Purchase and Trackage Rights—Delaware & Hudson Railway Company*, STB Finance Docket No. 31700 (Sub.-No. 13), 1998 STB LEXIS 859 (Served on Nov. 6, 1998) *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al.* (Arbitration Review), Finance Docket No. 28905 (Sub.-No. 27), 1997 STB LEXIS 152 (Served on July 15, 1997) (prohibition against replies to replies may be waived upon showing of good cause including explaining why additional argument could not have been made in original petition).

Penn Central's sur-reply will not prejudice the Claimants because Penn Central does not raise any new issues or arguments but merely responds to inconsistent and new arguments raised by the Claimants.

Furthermore, considering Penn Central's sur-reply will not delay these proceedings because of its compliance with the 20 day deadline of 49 C.F.R. 1104.13(a), which will not impact the final decision by the Board. This is particularly true because, for the reasons Penn Central set forth previously, the Board should hear oral argument in this matter.

For these reasons, Penn Central respectfully requests that the Board grant its Motion For Leave to File Sur-reply and Motion to Supplement the Record in Response to Claimants' Brief in Opposition and accept as filed the Sur-reply Brief attached hereto as Exhibit A.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing was sent by electronic mail to the following on November 17, 2009:

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